

Proposed Amendments to the CBP Regulations

For the reasons set forth above, it is proposed to amend parts 10 and 163 of title 19 of the Code of Federal Regulations as set forth below.

PART 10—ARTICLES CONDITIONALLY FREE, SUBJECT TO A REDUCED RATE, ETC.

1. The general authority citation for part 10 continues to read and a specific authority is added for § 10.121 as follows:

Authority: 19 U.S.C. 66, 1202 (General Note 3(i), Harmonized Tariff Schedule of the United States (HTSUS)), 1321, 1481, 1484, 1498, 1508, 1623, 1624, 3314.

* * * * *

Section 10.121 also issued under 19 U.S.C. 2501;

* * * * *

2. Section 10.121(b) is revised to read as follows:

§ 10.121 Visual or auditory materials of an educational, scientific, or cultural character.

* * * * *

(b) Articles entered under subheading 9817.00.40, HTSUS, will be released from CBP custody prior to submission of the document required in paragraph (a) of this section only upon the deposit of estimated duties with the port director. Liquidation of an entry which has been released under this procedure will be suspended for a period of 314 days from the date of entry or until the required document is submitted, whichever comes first. In the event that documentation is not submitted before liquidation, the merchandise will be classified and liquidated in the ordinary course, without regard to subheading 9817.00.40, HTSUS.

PART 163—RECORDKEEPING

3. The authority citation for part 163 continues to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1484, 1508, 1509, 1510, 1624.

* * * * *

Appendix to Part 163—[Amended]

4. Section IV is amended by removing the listing “§ 10.121 Certificate from USIA for visual/auditory materials” and adding in its place the listing “§ 10.121

Certificate from the U.S. Department of State for visual/auditory materials”.

Alan D. Bersin,

Commissioner, U.S. Customs and Border Protection.

Approved: August 16, 2011.

Timothy E. Skud,

Deputy Assistant Secretary of the Treasury.

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AGENCY FOR INTERNATIONAL DEVELOPMENT

22 CFR Part 228

[Aid Reg. 228]

RIN 0412–AA70

Procurement of Commodities and Services Financed by USAID

AGENCY: Agency for International Development (USAID).

ACTION: Proposed rule.

SUMMARY: This proposed rule implements the statutory requirement that funds made available by the United States Congress (Congress) to USAID under the authority of the Foreign Assistance Act of 1961, as amended (FAA), be used for procurement in the United States (U.S.), the recipient country, or developing countries. It does so by revising USAID’s current source, origin and nationality (S/O/N) regulation to track more closely the statutory procurement authority provided under the FAA and referenced above; by establishing a single code for procurements from the U.S., recipient country and developing countries; by deleting the concept of “origin,” which is increasingly obsolete and difficult to apply in today’s globalized economy; and by simplifying the concepts of “source” and “nationality” in order to reflect better Congress’s directive to procure from the U.S., recipient or developing countries.

DATES: Comments must be received by close of business October 3, 2011.

ADDRESSES: You may submit comments, identified by Regulatory Information Number, RIN 0412–AA70, by any of the following methods:

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

- *E-mail:* jniemeyer@usaid.gov.

Include RIN number 0412–AA70 in the subject line of the message.

- *Mail:* U.S. Agency for International Development, Office of the General Counsel, Room 6.07–105, 1300 Pennsylvania Ave., NW., Washington,

DC 20523, Attention: John R. Niemeyer, Esq.

- *Instructions:* All submissions received must include the Agency name and docket number or Regulatory Information Number (RIN 0412–AA70) for this rulemaking. All comments received will be included in the public docket without change and will be made available online at <http://www.regulations.gov>, including any personal information provided. *Public Participation:* Because security screening precautions have slowed the delivery and dependability of surface mail and hand delivery to USAID/ Washington, USAID recommends sending all comments to the Federal eRulemaking Portal. The e-mail address listed above is provided in the event that submission to the Federal eRulemaking Portal is not convenient (all comments must be in writing to be reviewed). You may submit comments by electronic mail, avoiding the use of any special characters and any form of encryption.

USAID will consider all comments in response to the proposed rule as USAID determines how to revise its S/O/N regulation, and will reconcile all comments (similar comments by category) in any published, final rule. All comments will be posted at the portal for Federal rulemaking, [regulations.gov](http://www.regulations.gov), under Regulatory Information Number, RIN 0412–AA70.

FOR FURTHER INFORMATION CONTACT: John Niemeyer (or designee), Attorney Advisor, Office of the General Counsel, USAID, Rm. 6.07–105, 1300 Pennsylvania Ave., NW., Washington, DC 20523; telephone: (202) 712–5053 (this is not a toll-free number); jniemeyer@usaid.gov.

SUPPLEMENTARY INFORMATION:

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I. Background

On February 16, 2011, USAID published in the **Federal Register** (76 FR 8961) an Advanced Notice of Public Rulemaking (ANPRM), notifying the public that USAID intended to review

and revise its S/O/N regulation found at 22 CFR part 228, which in turn implements section 604(a) of the FAA. The Agency provided a forty-five (45)-day public comment period on the ANPRM, which ended Monday, April 4, 2011. The Agency also offered the public the opportunity to submit comments by surface mail, e-mail or fax.

The ANPRM invited comments and suggestions on the existing S/O/N rules in 22 CFR part 228. In particular, USAID inquired

- What, if any, sections of 22 CFR part 228 lead to inefficiencies and ineffectiveness in implementing USAID development assistance activities and programs? What are the efficiency impacts to contractors and grantees from provisions reflecting the concept of “origin” and “source” (essentially, the country where a commodity is produced and the country from which a commodity is shipped to the cooperating country, respectively, see 22 CFR 228.01), given the difficulty of determining with specificity the origin and source of many commodities in an increasingly globalized economy?

- Should the regulatory guidance concerning “nationality” (the place of incorporation, ownership, citizenship, residence, *etc.* of suppliers of USAID-financed goods and services) be modified, and if so, in what manner to improve efficacy of the rule, particularly as applied to suppliers of services and goods in the recipient country?

- Should USAID modify the “special source rules,” FAA 604(b), (c), (e), (f), and (g), and reflected in 22 CFR 228.13, for procurement of agricultural commodities, vehicles or pharmaceuticals within limitations set forth in the FAA; and, if so, in what manner?

- Should references in 22 CFR part 228 to other statutory requirements, such as the Fly America Act (49 U.S.C. 40118) be removed or changed? Specifically is it useful for USAID to include Agency-specific policy and procedures in 22 CFR part 228, when separate statutes and prevailing regulatory systems are already in place and publicly available from other sources?

What difficulties do contractors and grantees encounter when requesting a waiver to procure in any country other than those in the approved geographic code for each USAID-funded agreement (contract or grant)? How can USAID’s waiver guidance be modified or improved for more clear and cost effective application of the statutory and regulatory waiver requirements? If commenters suggest modification, USAID requests specific proposals for

what elements of 22 CFR part 228 should be modified.

USAID also sought comments in the ANPRM concerning the potential costs of modifying the existing regulation, and the potential, quantifiable efficiency benefits of modifying the regulation.

USAID received twenty-one comments in response to the ANPRM, all strongly in favor of substantial simplification of the regulation to reflect the globalization of the economy. Comments also urged revision of the existing regulation due to the growing obsolescence of concepts like “origin” in the globalized economy; and stressed the difficulty of applying the geographic codes established in the current rule, and in particular, of finding United States “origin” commodities and services, as defined by the current regulation, for procurement in support of USAID funded aid programs. Comments received in response to the ANPRM are discussed and addressed in greater detail, below in “Background.”

The proposed rule, below, reflects comments received in response to the ANPRM, and has been reviewed by the Office of Management and Budget’s Office of Information and Regulatory Affairs. The period for comments concerning the proposed rule has been established at forty-five (45) days, due to the high visibility of United States Government assistance programs in response to current and anticipated political, humanitarian and natural disaster crises, and the shortness and lack of complexity of the proposed rule.

The initial version of the FAA procurement provision in Section 604(a) provided that funds made available under the FAA could be used for procurement outside the United States only if the President made a determination that such procurement would not have adverse effects upon the economy of the U.S., or that any such harm was outweighed by the benefits of “less costly government procurement outside the United States.” USAID implemented this directive by adapting the concepts of “source, origin and nationality” developed under USAID’s commodity import program (CIP),¹ to all its procurements under the FAA. USAID also adapted the “geographic source codes” developed under the CIP to apply to all USAID financed procurements, in part in order to address Congress’s concern that U.S. taxpayer funded foreign assistance not provide any direct benefits to the

governments of communist countries during the Cold War.

In 1993, Congress amended the FAA procurement authorities in Section 604(a) to provide that funds made available to USAID may be used for procurement from the U.S., the recipient country, or developing countries (but not advanced developing countries). However, USAID did not change its procurement regulations to reflect the change in statutory procurement authorities, but instead self-imposed a policy to continue to follow the same limits on procurement in the recipient and developing countries as if the 1993 statutory amendments had not occurred. The concepts of source, origin and nationality were maintained in USAID’s procurement regulations at 22 CFR part 228, as were the geographic source codes, none of which captured in any single code Congress’s clear 1993 directive to procure from the U.S., recipient country, or developing countries.

Because of the end of the Cold War and the subsequent globalization of the economy, this approach has become increasingly difficult to administer and in some respects obsolete. In an era of tightening budgets, the costs of compliance with the now needlessly complex regulation, and of the self-imposed and unnecessary restrictions on procurement in recipient and developing countries means that the foreign assistance dollar does not go as far as it would with a more straightforward regulation that reflects the statutory authority to procure in the recipient country and other developing countries, in addition to the U.S.

Comments received in response to the ANPRM detail the mounting inefficiencies and costs of the current regulation. Comments generally fell into the following categories: Strongly supportive of review and revision; eliminate the regulation entirely and rely instead on USAID’s statutory procurement authority (FAA Section 604(a), above); replace the authorized geographic codes in the current regulation with a simpler approach; Geographic Code 000 (procure from United States source, origin and nationality) is not relevant in today’s globalized economy; adherence to Code 000 slows implementation and costs resources better devoted to development; commodities of Code 000 are ineffective in achieving development impact due to warranty and servicing problems abroad; services are frequently needed from non-Code 000 suppliers abroad; source requirements should be eliminated; origin requirements should be

¹ A CIP is a program in which USAID provides foreign exchange to a host country that, by the terms of the applicable agreement between USAID and the host country, is used to finance particular commodity import transactions of the host country.

eliminated; and waiver procedures should be reduced and streamlined. There were also many specific recommendations about particular types of commodity procurements, such as modifying the regulations concerning procurement of used or leased commodities. While USAID did not receive any cost-specific data, several commenters estimated that the time for processing of waivers needed when Code 000 (United States) commodities and services were unavailable ranges from 10–90 days, depending on circumstances such as the length of time needed to complete a market survey, draft the waiver documents, and process the waiver according to implementing partner and USAID procedures.

Several commenters made the point that because of the development of a world or globalized economy since the end of the Cold War, it is difficult to determine with any accuracy where a commodity is produced, due to the myriad sources of components that go into manufacture of many commodities and the movement overseas of the manufacturing operations of many U.S. producers (for example, one commenter commented that little if any computer hardware is manufactured in the United States). Other commodities, such as much information technology and office equipment, certain types of vehicles, and copiers, are not generally available from U.S. origin producers. Because of these challenges, USAID and its implementing partners are frequently required to process waivers to the current S/O/N requirements, costing (based on the data of one commenter) an average of 55 days delay and processing time per waiver. While USAID attempts to expedite such waivers, especially in response to natural or other foreign disasters requiring an emergency response, the waiver process can still slow USAID's emergency responses.

Other commenters note that because of their complexity (for example, the current regulation requires a "systems determination" to determine where the components that make up a system, rather than single commodity, are produced, as part of the determination of a commodity's "origin"), the regulations are sometimes inconsistently applied by USAID missions across the world. Additional concerns about the unavailability of servicing and repairs, spare parts, warranty enforcement, voltage and video format incompatibility, and suitability of some U.S. origin commodities for use in the underdeveloped economies and countries in which USAID works, when taken together present a critique of a

regulation in need of revision and updating.

Additional specific comments proposed revisions to the waiver provisions of the current regulation, and many advocated for increased local procurements as both good development and a spur for economic growth in underdeveloped countries. Several comments argued for revision of the restricted commodities provisions in the current regulation, and one urged a clarification that commodities from the General Service Administration supply schedule should be considered to be U.S. source commodities. USAID reviewed and considered all comments, which informed the proposed rule.

II. The Proposed Rule

A. Purpose of Rule

The purpose of this rule is to bring USAID regulations into full alignment with section 604(a) of the Foreign Assistance Act of 1961, as amended, which directs that funds made available under the FAA may be used for procurement "in the United States, the recipient country, or developing countries."

B. USAID Regulations Amended by This Rule

The proposed rule amends in its entirety 22 CFR part 228, Rules on Source, Origin and Nationality for Commodities and Services Financed by USAID. The proposed, amended rule applies to all commodities and services financed by USAID.

C. Summary of Changes to the Existing Rule

The proposed rule revises the existing regulation to track more closely the statutory procurement authority provided under the FAA by establishing a single code for procurements from the U.S., recipient country, and developing countries. The proposed rule also deletes the concept of "origin," which is increasingly obsolete and difficult to apply in today's globalized economy, and in place of the concept of "origin," simplifies and strengthens the concepts of "source" and "nationality" in order to reflect better Congress's directive to procure from the U.S., recipient or developing countries. Section 228.02 preserves statutory procurement authority that augments FAA 604(a), such as Support for Economic and Democratic Development of the Independent States of the Former Soviet Union, 22 U.S.C. 2295b, and Development Fund for Africa, 22 U.S.C. 2293 *et seq.* The proposed rule clarifies that waivers to permit procurements

beyond the United States, recipient, or developing countries will be to Code 935—any area or country but excluding countries to which assistance is prohibited by law (such prohibited countries were formerly referred to as "foreign policy restricted countries"). USAID will maintain a list of countries to which assistance is prohibited by law, which will be available in USAID's Automated Directives System, ADS 310. The proposed rule also proposes to raise the amount, from \$5 million to \$10 million, for which foreign owned local firms will be eligible for construction procurement, 22 CFR 228.13, because that amount has not been raised in over fifteen years. Finally, the proposed rule also clarifies that case by case waivers can be approved by commodity or service type or category (for example, a category of medical equipment like diagnostic machinery, or of services like translation services), to obviate the need for repeat or serial waivers for the same type or category of commodity or service.

D. Regulatory Planning and Review: Findings and Certifications of Impact Assessment

Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has been designated a "significant regulatory action" although not economically significant, under section 3(f) of Executive Order 12866. Accordingly, the rule has been reviewed by the Office of Management and Budget.

This rule is not a major rule under 5 U.S.C. 804. However, in order to ensure compliance with Executive Branch rulemaking policy and priorities, this rule has been reviewed by the Office of Information and Regulatory Affairs of the Office of Management and Budget.

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), USAID has considered the economic impact of the proposed rule and has determined that its provisions would not have a significant economic impact on a substantial number of small entities.

List of Subjects in 22 CFR Part 228

Foreign aid, Procurement, USAID contractors, Grantees and non-governmental recipients.

For the reasons set forth above and based on the comments received in response to the ANPRM, USAID proposes to revise 22 CFR part 228 as follows:

PART 228—RULES FOR PROCUREMENT OF COMMODITIES AND SERVICES FINANCED BY USAID**Subpart A—Definitions and Scope of This Part**

Sec.

- 228.01 Definitions.
- 228.02 Scope and application.
- 228.03 Identification of the principal geographic code.

Subpart B—Conditions Governing Source and Nationality of Commodity and Service Procurement Transactions for USAID Financing

- 228.10 Purpose.
- 228.11 Source of commodities.
- 228.12 Nationality of suppliers of commodities and services.
- 228.13 Foreign government-owned organizations.
- 228.14 Construction services from foreign-owned local firms.
- 228.15 Nationality of employees under contracts or subcontracts for services.
- 228.16 Miscellaneous service transactions.
- 228.17 Special procurement rules for construction and engineering services.
- 228.18 Long-term leases.
- 228.19 Special source rules requiring procurement from the United States.

Subpart C—Conditions Governing the Eligibility of Commodity-Related Services for USAID Financing

- 228.20 Purpose.
- 228.21 Ocean transportation.
- 228.22 Air transportation.
- 228.23 Other delivery services.
- 228.24 Incidental services.

Subpart D—Waivers

- 228.30 General.
- 228.31 Authority to approve waivers.

Authority: Sec. 621, Pub. L. 87–195, 75 Stat. 445 (22 U.S.C. 2381), as amended, E.O. 12163, Sept. 29, 1979, 44 FR 56673; 3 CFR 1979 Comp., p. 435.

Subpart A—Definitions and Scope of This Part**§ 228.01 Definitions.**

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

Advanced developing countries mean those countries that are categorized by the World Bank as upper middle income countries according to its gross national income per capita, except for those countries in which USAID provides

assistance. USAID will maintain a list of advanced developing countries primarily based on the most recent World Bank determinations, and which will be available in USAID's Automated Directives System, ADS 310.

Available for purchase means that there have been documented, multiple sales of a commodity or service by the supplier of the commodity or service in an authorized country during the past calendar year. Additionally, for commodities, the commodity is located in such country at the time of purchase from the supplier, and if applicable, can be serviced, and if warrantied, has a warranty valid, in the recipient country. Recipients and contractors must document in their project files that the commodities and services to be procured are available for purchase according to the standards set forth in this definition. There is a *de minimis* exception to the documentation requirement for procurements in the amount of up to \$5,000 per procurement, primarily intended for procurements of office supplies or other frequently recurring procurements.

Commodity means any material, article, supply, goods, or equipment. Commodity-related services means delivery services and/or incidental services.

Cooperating country or recipient country means the country receiving the USAID assistance subject to this part 228, and includes all the countries receiving assistance under a regional program or project.

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

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

Developing countries means those countries that are categorized by the World Bank as low or middle income according to its gross national income per capita, and also including all countries to which USAID provides

assistance. USAID will maintain a list of developing countries primarily based on the most recent World Bank determinations, and which will be available in USAID's Automated Directives System, ADS 310.

Implementing document means any document, such as a contract, grant, or letter of commitment issued by USAID, which authorizes the use of USAID funds for the procurement of services or commodities and/or commodity related services, and which specific conditions apply to such procurement.

Incidental services means services such as installation, erection, maintenance, or upgrading of USAID-financed equipment, or the training of personnel in the maintenance, operation and use of such equipment, or similar services provided for the authorized disposition of such commodities.

Mission means the USAID Mission, office or representative in a cooperating/recipient country. *Nationality* refers to the place of legal organization, ownership, citizenship, or lawful permanent residence of suppliers of goods and services.

Recipients and contractors. *Recipient* has the same meaning as defined in 22 CFR 226.02. *Contractors* mean those entities which enter into a contract, as the term is defined in 48 CFR part 2, with the U.S. Government.

Services mean the performance of identifiable tasks, rather than the delivery of an end item of supply.

Source means the country from which a commodity is shipped to the cooperating/recipient country or the cooperating/recipient country itself if the commodity is located therein at the time of the purchase. Where, however, a commodity is shipped from a free port or bonded warehouse in the form in which received therein, "source" means the country from which the commodity was shipped to the free port or bonded warehouse. For a commodity to have a country as its source, it must also be available for purchase in that country.

Supplier means any person or organization, governmental or otherwise, who furnishes services, commodities and/or commodity related services, including delivery or incidental services, financed by USAID.

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

USAID means the United States Agency for International Development or any successor agency, including when applicable, each USAID Mission or office abroad.

USAID Geographic Code means a code in the USAID Geographic Code Book which designates a country, a group of countries, or an otherwise defined area. The USAID geographic code for purposes of procurement is described in § 228.03 of this part.

§ 228.02 Scope and application.

(a) This part is applicable to commodities and services financed directly with program funds appropriated under the Foreign Assistance Act of 1961, as amended, 22 U.S.C. 2151 *et seq.* If additional authorities and conditions that apply to a USAID-financed procurement are otherwise provided by statute, regulation, or related administrative authorities, those authorities and conditions shall be incorporated in the implementing document and shall prevail in the event of any conflict with this part 228. The authorities and conditions applicable to procurement of commodities or services shall be those in effect on the date of the issuance by USAID of an implementing document for procurement of commodities or services, and include any directives, prohibitions, restrictions or other statutory and related requirements by the United States Congress that govern the funds appropriated to fund the specific procurement, including those on types of assistance and recipients of assistance.

(b) This part is not applicable to commodities purchased under General Services Administration (GSA) supply schedules. Nor is it applicable to procurements with donated funds received under USAID's gift authority, Section 635(d), Foreign Assistance Act of 1961, as amended.

§ 228.03 Identification of the principal geographic code.

(a) The USAID Geographic Code Book sets forth the official description of all geographic codes used by USAID in authorizing or implementing documents, the principal codes of which are used to designate authorized source countries or areas. This regulation establishes one geographic code for procurement of commodities and services under implementing documents unless otherwise specified, the specific number of which is to be determined but hereafter referred to in this regulation as Code xxx for all USAID financed procurements. Code xxx is defined as the United States, the recipient country, and developing countries other than advanced developing countries and countries to which assistance is prohibited by law. USAID will maintain a list of advanced

developing countries and a list of countries to which assistance is prohibited by law, which will be available in USAID's Automated Directives System, ADS 310.

(b) For purposes of any waivers authorized under subpart D of this part, the authorized procurement code shall be Code 935, any area or country but excluding those countries to which assistance is prohibited by law.

Subpart B—Conditions Governing Source and Nationality of Commodity and Service Procurement Transactions for USAID Financing

§ 228.10 Purpose.

Sections 228.11 through 228.18 of this part set forth the rules governing the eligible source of commodities and nationality of commodity and service suppliers for USAID financing. The provisions in these sections may be waived in accordance with the provisions in subpart D of this part.

§ 228.11 Source of commodities.

The source of all commodities financed with program funds appropriated under the Foreign Assistance Act of 1961, as amended, shall be Code xxx. Certain commodities must also comply with the special procurement rules in § 228.18 of this part.

§ 228.12 Nationality of suppliers of commodities and services.

The suppliers of all commodities and services financed with program funds appropriated under the Foreign Assistance Act of 1961 shall:

(a) If an individual, be a citizen or lawful permanent resident of a country in Code xxx,

(b) If a for-profit organization,

(1) Be organized under the laws of a country in Code xxx;

(2) Have its principal place of business in a country in Code xxx; and

(3) Be majority [directly] owned, or majority beneficially owned, by individuals who are citizens or lawful permanent residents of countries in Code xxx, or

(c) If a not-for-profit organization performing as a contractor or subcontractor,

(1) Be organized under the laws of a country in Code xxx;

(2) Have its principal place of business in a country in Code xxx; and

(3) Be managed by a governing body, the majority of whom are citizens or lawful permanent residents of countries in Code xxx.

§ 228.13 Foreign government-owned organizations.

Firms operated as commercial companies or other organizations (including nonprofit organizations other than public educational institutions) in which foreign governments or their agents or agencies have a controlling interest are not eligible for financing by USAID, including in a subcontractor or subgrantee capacity, except if their eligibility has been established by a waiver approved by USAID in accordance with the procedures set forth in Subpart D. Foreign government ministries or agencies are eligible for financing by USAID.

§ 228.14 Construction procurement with foreign-owned local firms.

(a) When the estimated cost of a contract for construction is \$10 million or less and only local firms will be solicited, a local corporation or partnership which is a foreign-owned local firm will be eligible, see paragraph (b) of this section, if it is determined by USAID to be an integral part of the local economy. However, such a determination is contingent on first ascertaining that no United States construction company with the required capability is currently operating in the cooperating/recipient country or, if there is such a company, that it is not interested in bidding for the proposed contract.

(b) A foreign-owned local firm is an integral part of the local economy provided:

(1) It has done business in the cooperating/recipient country on a continuing basis for at least three years prior to the issuance date of invitations for bids or requests for proposals to be financed by USAID;

(2) It has a demonstrated capability to undertake the proposed activity;

(3) All, or substantially all, of its directors of local operations, senior staff and operating personnel are lawfully resident in the cooperating/recipient country; and

(4) Most of its operating equipment and physical plant are in the cooperating/recipient country.

§ 228.15 Nationality of employees under contracts or subcontracts for services.

The rules set forth in §§ 228.10 through 228.13 do not apply to the employees or individual technical or professional consultants providing personal services to recipients or contractors (consistent with the applicable cost principles for the type of organization). Citizens or lawful permanent residents of countries to which assistance is prohibited by law

are not eligible for USAID financing under this section. USAID will maintain a list of countries to which assistance is prohibited by law, which will be available in USAID's Automated Directives System, ADS 310.

§ 228.16 Miscellaneous service transactions.

This section sets forth rules governing certain miscellaneous services.

(a) *Commissions.* The nationality rules of this part do not apply to the payment of commissions by suppliers. A commission is defined as any payment or allowance by a supplier to any person for the contribution which that person has made to secure the sale or contract for the supplier or which that person makes to securing on a continuing basis similar sales or contracts for the supplier.

(b) *Bonds and guarantees.* The nationality rules of this part do not apply to sureties, insurance companies or banks who issue bonds or guarantees under USAID-financed contracts.

(c) *Liability insurance under construction contracts.* The nationality rules of this part do not apply to firms providing liability insurance under construction contracts.

§ 228.17 Special procurement rules for construction and engineering services.

Advanced developing countries which have attained a competitive capability in international markets for construction services or engineering services, are not eligible to furnish USAID-financed construction and engineering services unless approved to do so under the waiver provisions set forth under subpart D of this part.

§ 228.18 Long-term leases.

Any commodity obtained under a long-term lease agreement, including motor vehicles, is subject to the source and nationality requirements of this subpart B. For purposes of this subpart B, a long-term lease is defined as a single lease of more than 180 days, or repetitive or intermittent leases, including vehicle leases, under a single activity or program within a one-year period totaling more than 180 days, for the same type of commodity.

§ 228.19 Special procurement rules requiring procurement from the United States.

(a) Agricultural commodities and products thereof must be procured in the United States if the domestic price is less than parity, unless the commodity cannot reasonably be procured in the United States in fulfillment of the objectives of a particular assistance program under

which such commodity procurement is to be financed. (22 U.S.C. 2354). USAID will maintain a list of affected agricultural commodities, which will be available in USAID's Automated Directives System, ADS 310.

(b) Motor vehicles must be manufactured in the United States to be eligible for USAID financing. Also, any vehicle to be financed by USAID under a long-term lease or where the sale is to be guaranteed by USAID must be manufactured in the United States. (22 U.S.C. 2396). For purposes of this section, motor vehicles are defined as self-propelled vehicles with passenger carriage capacity, such as highway trucks, passenger cars and buses, motorcycles, scooters, motorized bicycles, ATVs and utility vehicles. Excluded from this definition are ambulances, snowmobiles, industrial vehicles for materials handling and earthmoving, such as lift trucks, tractors, graders, scrapers, off-the-highway trucks (such as off-road dump trucks), and other vehicles that are not designed for travel at normal road speeds (40 kilometers per hour and above). Procurement or leasing of motor vehicles must comply with United States law, see 22 U.S.C. 2396.

(c) USAID shall not finance any pharmaceutical product manufactured outside the United States if the manufacture of such product in the United States would involve the use of, or be covered by, a valid patent of the United States, unless such manufacture is expressly authorized by the owner of such patent. (22 U.S.C. 2356). In addition, USAID shall not finance non-contraceptive pharmaceuticals without prior written approval as provided in USAID's Automated Directives System Chapter 310. Contraceptives may be financed in accordance with the procedures in ADS 310.

Subpart C—Conditions Governing the Eligibility of Commodity-Related Services for USAID Financing

§ 228.20 Purpose.

This subpart C governs the eligibility of commodity-related services, both delivery services and incidental services, for USAID financing. These rules, except for those in § 228.21, may be waived in accordance with the provisions in subpart D of this part. The rules on delivery services apply whether or not USAID is also financing the commodities being transported. In order to be identified and eligible as incidental services, such services must be connected with a USAID-financed commodity procurement.

§ 228.21 Ocean transportation.

When transporting commodities subject to the provisions of the Cargo Preference Act, 46 U.S.C. 55305, USAID will administer its programs in accordance with that act and its implementing regulations in 46 CFR part 381 (and any waivers applicable thereto). Subpart D of 22 CFR part 228 does not apply to this provision.

§ 228.22 Air transportation.

The Fly America Act, Title 49 of the United States Code, Subtitle VII, Part A, subpart I, Chapter 401, 40118—Government-Financed Air Transportation, is applicable to all travel subject to this part.

§ 228.23 Other delivery services.

No source or nationality rules apply to other delivery services, such as export packing, loading, commodity inspection services, and services of a freight forwarder. Such services are eligible when provided as part of a commodity procurement financed by USAID.

§ 228.24 Incidental services.

Source and nationality rules do not apply to suppliers of incidental services specified in a purchase contract relating to equipment.

Subpart D—Waivers

§ 228.30 General.

USAID may waive the rules contained in Subparts A, B and C of this part, except for those in § 228.21, in order to accomplish project or program objectives. All waivers must be in writing, and where applicable, are limited to the term established by the waiver.

(a) Waivers to permit procurement outside of Code xxx must be based on a case by case determination that

(1) The provision of assistance requires commodities or services of the type that are not produced in and available for purchase in Code xxx;

(2) It is important to permit procurement from a country not specified in Code xxx to meet unforeseen circumstances;

(3) To promote efficiency in the use of United States foreign assistance resources, including to avoid impairment of foreign assistance objectives

(b) Case by case waivers under paragraph (a) of this section may be made on the basis of a commodity or service type or category, rather than processing repeat, individual waivers for an identical or substantially similar commodity or service. A waiver under paragraph (a)(1) of this section may be

based on a determination that the commodities or services are of a type not produced in and available for purchase in Code xxx and may also be based on a factual finding that a commodity is not mined or grown in Code xxx, or if produced, any substantial part of manufacturing, assembly or processing of a commodity takes place in a country other than in Code xxx. A waiver under paragraph (a)(1) of this section may also be based on the fact that a commodity is not available for purchase in Code xxx in sufficient, reasonable and available quantities or sufficient and reasonable quality that is fit for the intended purpose.

(c) A waiver to authorize procurement from outside the United States of agricultural commodities, motor vehicles, and pharmaceuticals (see § 228.18) must also meet the requirements established in USAID directives on commodity eligibility. USAID will maintain a list of current requirements for commodity eligibility, which will be available in USAID's Automated Directives System, ADS 310.

(d) Any individual transaction not exceeding \$25,000 (excluding those covered by special procurement rules in § 228.18) does not require a waiver.

§ 228.31 Authority to approve waivers.

The authority to approve waivers of established policies on source and nationality are delegated authorities within USAID. Contractors or recipients of assistance agreements shall request any necessary waivers through the USAID contracting or agreement officer.

John R. Niemeyer,

Office of the General Counsel.

[FR Doc. 2011-20773 Filed 8-18-11; 8:45 am]

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DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG-109006-11]

RIN 1545-BK13

Modifications of Certain Derivative Contracts; Correction

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Correction to notice of proposed rulemaking by cross-reference to temporary regulations.

SUMMARY: This document contains corrections to a notice of proposed rulemaking by cross-reference to

temporary regulations (REG-109006-11) relating to whether an exchange for purposes of § 1.1001-1(a) occurs for the nonassigning counterparty when there is an assignment of certain derivative contracts. It was published in the **Federal Register** on Friday, July 22, 2011 (76 FR 43957).

FOR FURTHER INFORMATION CONTACT:

Concerning the proposed regulations, Andrea M. Hoffenson, (202) 622-3920 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

The correction notice that is the subject of this document is under section 1001 of the Internal Revenue Code.

Need for Correction

As published, the notice of proposed rulemaking by cross-reference to temporary regulations (REG-109006-11) contains errors that may prove to be misleading and are in need of clarification.

Correction of Publication

Accordingly, the publication of the notice of proposed rulemaking by cross-reference to temporary regulations (REG-109006-11), which was the subject of FR Doc. 2011-18531, is corrected as follows:

1. On page 43957, column 2, in the preamble, under the caption **FOR FURTHER INFORMATION CONTACT:**, second line, the language "Andrea Hoffenson, (202) 622-3920" is corrected to read "Andrea M. Hoffenson, (202) 622-3920;"

2. On page 43957, column 4, in the preamble, under the paragraph heading "Drafting Information", third line, the language "Office of Associate Chief Council" is corrected to read "Office of Associate Chief Counsel".

LaNita Van Dyke,

Chief, Publications and Regulations Branch, Legal Processing Division, Associate Chief Counsel (Procedure and Administration).

[FR Doc. 2011-21182 Filed 8-18-11; 8:45 am]

BILLING CODE 4830-01-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R03-OAR-2011-0600; FRL-9453-3]

Approval and Promulgation of Air Quality Implementation Plans; Maryland; Adoption of Plastic Parts and Business Machines Coating Standards

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve a State Implementation Plan (SIP) revision submitted by the State of Maryland (Maryland). This SIP revision includes amendments to the Code of Maryland (COMAR) 26.11.19.07, Volatile Organic Compounds from Specific Processes, Paper, Fabric, Film and Foil Coating, and adds new COMAR 26.11.19.07-2, Plastic Parts and Business Machines Coating. Maryland's SIP revision meets the requirement to adopt Reasonably Available Control Technology (RACT) for sources covered by EPA's Control Techniques Guidelines (CTG) for Miscellaneous Metal and Plastic Parts Coatings and will help Maryland attain and maintain the National Ambient Air Quality Standard (NAAQS) for ozone. This action is being taken under the Clean Air Act (CAA).

DATES: Written comments must be received on or before September 19, 2011.

ADDRESSES: Submit your comments, identified by Docket ID Number EPA-R03-OAR-2011-0600 by one of the following methods:

A. <http://www.regulations.gov>. Follow the on-line instructions for submitting comments.

B. *E-mail:* fernandez.cristina@epa.gov.

C. *Mail:* EPA-R03-OAR-2011-0600, Cristina Fernandez, Associate Director, Office of Air Program Planning, Mailcode 3AP30, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103.

D. *Hand Delivery:* At the previously-listed EPA Region III address. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA-R03-OAR-2011-0600. EPA's policy is that all comments received will be included in the public docket without change, and may be