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**DEPARTMENT OF HOMELAND SECURITY**

**Federal Emergency Management Agency**

**44 CFR Part 333**

**[Docket ID FEMA-2020-0019]**

**RIN 1660-AB04**

**Emergency Management Priorities and Allocations System (EMPAS)**

**AGENCY:** Federal Emergency Management Agency, DHS.

**ACTION:** Interim final rule.

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**SUMMARY:** This interim final rule establishes standards and procedures by which the Federal Emergency Management Agency (FEMA) may require certain contracts or orders that promote the national defense be given priority over other contracts or orders. This rule also sets new standards and procedures by which FEMA may allocate materials, services, and facilities to promote the national defense under emergency and non-emergency conditions pursuant to section 101 of the Defense Production Act of 1950, as amended. These regulations are part of FEMA's response to the ongoing COVID-19 emergency.

**DATES:** This rule is effective **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

*Comment Date:* Comments must be received on or before **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

**ADDRESSES:** You may submit comments, identified by Docket ID FEMA-2020-0019, via the Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

**FOR FURTHER INFORMATION CONTACT:** Marc Geier, Office of Policy and Program Analysis, 202-924-0196, [FEMA-DPA@fema.dhs.gov](mailto:FEMA-DPA@fema.dhs.gov).

**SUPPLEMENTARY INFORMATION:**

**I. Public Participation**

Interested persons are invited to participate in this rulemaking by submitting comments and related materials. We will consider all comments and material received during the comment period.

If you submit a comment, include the Docket ID FEMA-2020-0019, indicate the specific section of this document to which each comment applies, and give the reason for each comment. All submissions may be posted, without change, to the Federal e-Rulemaking Portal at <http://www.regulations.gov>, and will include any personal information you provide. Therefore, submitting this information makes it public.

*Viewing comments and documents:* For access to the docket to read background documents or comments received, go to the Federal e-Rulemaking Portal at <http://www.regulations.gov>.

**II. Background**

Section 101 of the Defense Production Act of 1950, as amended (DPA or the Act), authorizes the President to require that performance under contracts or orders (other than contracts of employment) which he deems necessary or appropriate to promote the

national defense take priority over performance under any other contract or order.<sup>1</sup> For the purpose of assuring such priority, the President may require acceptance and performance of such contracts or orders in preference to other contracts or orders by any person he finds to be capable of their performance.<sup>2</sup> Section 101 also authorizes the President to allocate materials, services, and facilities in such manner, upon such conditions, and to such extent as he shall deem necessary or appropriate to promote the national defense.<sup>3</sup> For the purposes of this discussion, these authorities are referred to as the President’s “priorities” and “allocations” authorities.

FEMA is publishing this rule to comply with Section 101(d), which requires agencies delegated authority under Section 101 to issue final rules to establish standards and procedures by which the priorities and allocations authority is used to promote the national defense, under both emergency and non-emergency conditions. Executive Order 13911, “Delegating Additional Authority Under the Defense Production Act With Respect to Health and Medical Resources To Respond to the Spread of COVID–19,” 85 FR 18403 (Apr. 1, 2020), delegates the President’s authority under Section 101 to the Secretary of Homeland Security with respect to health and medical resources needed to respond to the spread of Coronavirus Disease 2019 (COVID-19) within the United States. Executive Order 13911 provides that the Secretary may use the authority under section 101 of the Act to determine, in consultation with the heads of other executive departments and agencies as appropriate, the proper nationwide priorities and allocation of health and medical resources, including by controlling the distribution of such

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<sup>1</sup> 50 U.S.C. 4511(a)(1).

<sup>2</sup> 50 U.S.C. 4511(a)(1).

<sup>3</sup> 50 U.S.C. 4511(a)(2).

materials (including applicable services) in the civilian market, for responding to the spread of COVID-19 within the United States. Executive Order 13911 also delegates implementing authorities, such as enforcement authority under section 705 of the Act.<sup>4</sup>

The Secretary of Homeland Security has further delegated these authorities to the FEMA Administrator.<sup>5</sup> Priorities authorities (and other authorities delegated by the President to the Secretary of Homeland Security and re-delegated to the FEMA Administrator) may be re-delegated by the Administrator, to the extent consistent with the requirements of 3 U.S.C. 301 and the delegation of Presidential authority under which FEMA is operating. The Administrator retains authority for allocations.

This final rule establishes the Emergency Management Priorities and Allocations System (EMPAS), which will become part of the Federal Priorities and Allocations System (FPAS), which is the body of regulations that establishes standards and procedures for implementing the President’s authority under Section 101(a) of the DPA. Pursuant to Section 101(d) of the DPA, heads of Federal agencies to which the President delegates authority under section 101 must issue rules that establish standards and procedures by which the priorities and allocations authority is used, and develop a consistent and unified Federal priorities and allocations system.”

The EMPAS regulations have two principal components: priorities and allocations. Under the priorities component, contracts, or orders necessary or appropriate to support programs that have been approved for priorities support are required to be accepted and given priority over other contracts or orders to facilitate expedited delivery

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<sup>4</sup> 50 U.S.C. 4555.

<sup>5</sup> DHS Delegation 09052 Rev. 00.1, “Delegation of Defense Production Act Authority to the Administrator of the Federal Emergency Management Agency” (Apr. 1, 2020).

to promote the U.S. national defense. Under the allocations component, materials, services, and facilities may be allocated to promote the national defense. For both components, the term “national defense” is defined broadly and includes critical infrastructure protection and restoration, emergency preparedness and response, and recovery from man-made disasters.<sup>6</sup>

Section 101(d)(2) requires agencies with delegated authority under section 101 to consult as appropriate and to the extent practicable with other Federal agencies to develop a consistent and unified Federal priorities and allocations system. This rule is one of several rules published to implement Section 101 of the Act. The final rules of the agencies with Section 101 authorities, which are the Departments of Commerce, Energy, Health and Human Services, Transportation, and Agriculture,<sup>7</sup> currently constitute the FPAS. FEMA is publishing this interim final rule in compliance with Section 101(d) and FEMA’s EMPAS provisions are consistent with the FPAS regulations issued by other agencies.

Given the context in which the President delegated these authorities to the Secretary of Homeland Security, who then redelegate such authorities to the FEMA Administrator, FEMA prioritized consistency with those FPAS regulations that FEMA already uses and are most relevant to the current pandemic crisis. The regulations therefore draw heavily on (1) the Department of Commerce’s Defense Priorities and Allocations System (DPAS) regulations, found at 15 CFR part 700, which are the most commonly referenced and used FPAS regulations and which FEMA currently relies upon

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<sup>6</sup> See 50 U.S.C. 4552(14).

<sup>7</sup> See Executive Order 13603, “National Defense Resources Preparedness,” section 201, 77 FR 16651 (Mar. 22, 2012).

pursuant to a delegation of authority,<sup>8</sup> and (2) the Department of Health and Human Services' Health Resources Priorities and Allocations System (HRPAS) regulations, found at 45 CFR part 101, which relate to a resource category similar to the immediate impetus for this rulemaking. In general, in choosing between competing provisions, FEMA has favored those provisions that allow FEMA to respond to emergency circumstances, including the current pandemic crisis, with the greatest flexibility and speed.

The specific proposals in this rule are more fully described below.

### **III. Discussion of the Interim Final Rule**

This interim final rule adds 44 CFR part 333 to establish standards and procedures for prioritization of contracts and orders and for allocation of materials, services, and facilities to promote the national defense under both emergency and non-emergency conditions.

#### *A. Subpart A – Purpose*

Section 333.1 states that the purpose of the EMPAS, in general terms, is providing standards and procedures for use of those priorities and allocations authorities under the Defense Production Act that are the subject of a delegation from the President to DHS or FEMA. This includes, but is not limited to, use of such authority to support emergency preparedness activities pursuant to Title VI of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5195 *et seq.*), and related statutes, with respect to

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<sup>8</sup> See generally U.S. Dep't of Commerce, DPAS Delegation 4, Delegation of Authority to the Secretary of Homeland Security, [https://www.fema.gov/media-library-data/1484838423965-e82805cf10b55929142fab1fced213d8/DPAS\\_Delegation\\_4.pdf](https://www.fema.gov/media-library-data/1484838423965-e82805cf10b55929142fab1fced213d8/DPAS_Delegation_4.pdf) (Mar. 8, 2016) (delegating authority to DHS); DHS Delegation 09052 Rev. 00.1 (Apr. 1, 2020) (delegating authority to FEMA). The Department of Commerce is the resource department for “all other materials, services, and facilities, including construction materials” under Executive Order 13603 section 201, 77 FR 16651 (Mar. 22, 2012).

health and medical resources needed to respond to the spread of COVID-19 within the United States pursuant to Executive Order 13911.

FEMA has not limited the applicability of this rule to the COVID-19 context because of FEMA's unique mission set. Although FEMA's current authority under section 101 – which relates to health and medical resources needed to respond to the spread of COVID-19 within the United States – is based on Executive Order 13911, FEMA believes that it is critical to ensure that FEMA has an established set of EMPAS regulations available for immediate use in the event that the President delegates to DHS or FEMA additional priorities and allocations authorities in the future, including during an emergency situation. As stated in the description of section 333.2 below, FEMA does not anticipate a conflict with the delegated authorities of other resource agencies.

*B. Subpart B - Overview*

*1. Section 333.2 Program Eligibility*

Consistent with DPAS regulations at 15 CFR 700.2 and HRPAS regulations at 45 CFR 101.3, section 333.2 provides an overview of program eligibility and clarifies FEMA's ability to delegate authority to place priority ratings on contracts or orders to certain Federal Government agencies, to the extent consistent with the delegation of Presidential authority under which FEMA is operating. FEMA will post announcements regarding approved programs to [www.fema.gov](http://www.fema.gov).

*2. Section 333.3 Priority ratings and rated orders*

Consistent with the DPAS regulations at 15 CFR 700.3, Section 333.3 explains what priority ratings and rated orders are and generally how they will operate within EMPAS. Sections 333.4 through 333.7 are reserved.

### *C. Subpart C - Definitions*

The “Definitions” section appears in Section 333.8 and provides definitions for the relevant regulatory terms, consistent with DPAS regulations at 15 CFR 700.8 and the HRPAS regulations at 45 CFR 101.20. Section 333.9 is reserved. For purposes of this rulemaking, FEMA has chosen to define “health and medical resources” consistent with the definition of “health resources” in the HRPAS and other FPAS regulations for convenience and consistent with currently anticipated needs. FEMA may revise this definition by rulemaking, to the extent consistent with Executive Order 13911, at a future time. FEMA welcomes comment on this issue.

In contrast to other FPAS regulations, FEMA has chosen to specifically define “written” and “in writing” to make clear that FEMA will accept either tangible or electronic documents as “written” communications or records under this rule. FEMA wishes to allow electronic communication to the greatest extent possible, to allow for more efficient operations. In addition, FEMA has defined “written electronic” to mean written and in electronic form, except that when electronic form is impracticable under the circumstances, FEMA may construe this term to allow for a tangible format. As noted below, FEMA has made clear in certain provisions that it will not just permit, but also require, electronic communications.

### *D. Subpart D –Priorities and Placement of Rated Orders*

#### *1. Section 333.10 Authority*

Section 333.10 describes the authority under which FEMA is implementing DPA Section 101. Consistent with section 333.1, although this rule is being issued to implement the delegation of authority in Executive Order 13911 with respect to health



and medical resources needed to respond to the spread of COVID-19 within the United States, section 333.10 provides that FEMA may operate this rule under any authorities that the President may delegate to DHS or FEMA (or through DHS to FEMA) under section 101 of the Defense Production Act. This approach will ensure that FEMA is fully and immediately capable of fulfilling its emergency response and DPA coordination duties, including such duties as DHS and FEMA have long held under 104(b) of Executive Order 13603, to the extent that the President decides to further delegate priorities and allocations authorities to DHS or FEMA to carry out such duties.

FEMA does not anticipate that this approach will result in any conflicts with the delegated authorities of other resource agencies, because these regulations are specifically tied to presidential delegations of authority. Except in contexts where the President has delegated additional priorities and allocations authorities to DHS or FEMA, FEMA will continue to rely on other agencies' existing FPAS regulations, and the delegations issued thereunder, with respect to priorities and allocations issues.

## *2. Section 333.11 Priority ratings*

Consistent with the DPAS regulations at 15 CFR 700.11 and HRPAS regulations at 45 CFR 101.31, section 333.11 describes the two possible levels of priority and the program identification symbols used when rating an order. FEMA also clarifies that a priorities directive is a directive issued by FEMA regarding priority treatment for a given item. Such directives take precedence over any DX-rated order, DO-rated order, or unrated order, as stipulated in the directive.

## *3. Section 333.12 Elements of rated order*

Consistent with the DPAS regulations at 15 CFR 700.12, section 333.12 describes in detail what each rated order must include, consisting of the appropriate priority rating, delivery date information, signatures, and required language. Like the DPAS regulations, this provision requires certain emergency preparedness-related orders to include a statement regarding the time limits for accepting or rejecting the order. Unlike the DPAS regulations, FEMA is requiring that the statement also include specific reference to the mandatory acceptance and rejection provisions of section 333.13. The parallel DPAS regulation does not require this level of specificity, but FEMA thought it appropriate to require this text in the interest of clarity.

FEMA has added new text to section 333.12, to specify additional elements that must be included when FEMA or a Delegate Agency issues a rated order to facilitate a sale from the person to a third party, regardless of the nature of the third party's relationship with the Federal Government, if any. FEMA or a Delegate Agency may take such an action in the event that FEMA determines that such an order is necessary or appropriate to promote the national defense. Paragraph (c) requires all rated orders used to facilitate sales to third parties to include language making clear to the person receiving the order that the order is being placed to facilitate a sale to a third party. FEMA believes the additional required language in these rated orders will ensure those receiving the order clearly understand that the order is for the facilitation of a sale to a third party, and may help avoid any confusion or delay that might otherwise occur. Section 333.19, discussed below, also details special provisions for these orders. Requiring the additional notification in paragraph (c) of this section ensures that persons receiving such orders are fully informed of the applicability of the special provisions in section 333.19.

As part of the COVID-19 response, FEMA is coordinating efforts to assist third parties in obtaining critical health and medical resource supplies. Including this language in each rated order involving a third party ensures clarity, including with respect to the applicability of section 333.19, and is consistent with FEMA's role in facilitating the delivery of these critical resources to effectively respond to the current COVID-19 crisis.

*4. Section 333.13 Acceptance and rejection of rated orders*

Section 333.13 details when orders placed by FEMA may or must be accepted or rejected, and what the procedures are for both, including customer notification requirements for emergency conditions. Specifically, paragraph (a) requires acceptance of every rated order received regardless of any other rated or unrated orders that have been accepted and prohibits discrimination against rated orders such as by charging higher prices or imposing different terms and conditions. Paragraph (b) requires rejection of rated orders for delivery on a specified date if the person is unable to fill the order by that date, and requires the person to inform the customer of the earliest date on which delivery can be made and offer to accept the order on that basis. Paragraph (b) also provides for mandatory rejection based on the order rating, if other rated orders would be impacted. Paragraph (c) provides for optional rejection of rated orders in limited circumstances, consistent with DPAS regulations at 15 CFR 700.13(c) and HRPAS regulations at 45 CFR 101.33(c). Paragraph (d) details the customer notification requirements for rated orders. Consistent with DPAS regulations at 15 CFR 700.13(d)(2), FEMA is adopting a requirement that persons must accept or reject rated orders for emergency preparedness approved programs within the timeframe stated on the order. The regulation provides minimum time frames of 6 hours after receipt of the order

if in response to a hazard (including, for instance, an outbreak of infectious disease) that has occurred, or 12 hours after receipt if the order is issued to prepare for an imminent hazard. FEMA is adopting these timeframes because such orders would require a shorter time frame to ensure delivery in time to provide disaster assistance, emergency response, or similar activities. FEMA believes that the exigent circumstances inherent in such activities justify requiring a shorter response time. Further, FEMA is requiring written electronic confirmation of shipment or performance delays within a 24-hour period (rather than the one-working-day requirement in the DPAS regulations) given the exigent circumstances under which the agency must provide emergency preparedness, mitigation, response, and recovery services and the need for clear, reliable statements regarding such delays to ensure the ultimate timely delivery of these services.

*5. Section 333.14 Preferential scheduling*

Consistent with DPAS regulation at 15 CFR 700.14, section 333.14 details procedures for scheduling rated orders. Paragraph (a) explains generally that operations must be scheduled to satisfy delivery requirements of each rated order. Paragraph (b) details the appropriate production preferences based on rating order. Where rating orders conflict, paragraph (c) explains the appropriate preferences. If a person is unable to resolve such a conflict, this section refers them to special priorities assistance provided in Sections 333.20 through 333.24. Paragraph (d) allows the use of inventoried production items to fill rated orders when a person is unable to purchase the needed production items in time to fill a rated order and allows for their replacement with the use of a rated order.

*6. Section 333.15 Extension of priority ratings*

This section requires a person to use rated orders with suppliers to obtain items needed to fill a rated order, allowing the priority rating to “extend” from contractor to subcontractor to supplier throughout the entire procurement chain. In paragraph (c), FEMA is adopting the DPAS requirement in 15 CFR 700.15(c) that a person must use rated orders with suppliers to obtain items needed to fill an emergency preparedness order and that the supplier must accept or reject within the required time limit stated in the rated order that is being filled. FEMA is adopting the DPAS requirement to ensure delivery in time to provide disaster assistance, emergency response, or similar services. FEMA believes that the exigent circumstances inherent in such activities justify requiring a shorter response time.

*7. Section 333.16 Changes or cancellations of priority ratings and rated orders*

Consistent with both DPAS regulation at 15 CFR 700.16 and HRPAS regulations at 45 CFR 101.36, this section provides procedures for changing or cancelling a rated order by FEMA, a Federal Government agency authorized by delegation from FEMA to place priority ratings on contracts or orders needed to support approved programs (a “Delegate Agency”), and/or other persons who placed the order. Paragraph (a) explains how a priority rating on a rated order may be changed or cancelled and requires written electronic notification from the person who placed the rated order to expedite processing. Paragraph (b) explains that suppliers must give the appropriate preferential treatment to the order when it is changed to a higher priority rating. Paragraphs (c) and (d) describe what types of amendments do and do not constitute a new rated order, respectively. Paragraph (e) requires cancellation of rated orders or priority ratings on orders if the person no longer needs the items from suppliers. Paragraph (f) requires prompt

notification to all suppliers of rating additions, changes, or cancellations via written electronic notification to expedite processing.

*8. Section 333.17 Use of rated orders*

This section lists what items must be rated. Paragraph (a) details what rated orders must be used to obtain. Consistent with both DPAS regulation at 15 CFR 700.17(b) and HRPAS regulations at 101.37(b), paragraph (b) allows a person to use a rated order to replace inventoried items if such items were used to fill rated orders, under certain circumstances. Paragraphs (c) and (d) describe the use of program identification symbols when rated orders are combined, and detail the procedures for combining two or more rated orders, as well as rated and unrated orders. Paragraph (e) addresses rated orders for the minimum commercially procurable quantity, and paragraph (f) discusses ratings on contracts and orders for less than one half of the Simplified Acquisition Threshold as established by the Federal Acquisition Regulation (FAR). See 48 CFR 2.101. FEMA's provision is consistent with the parallel DPAS and HRPAS provisions, except that FEMA's provision eliminates the specific dollar amount to ensure consistency with the current and future FAR provisions.<sup>9</sup>

*9. Section 333.18 Limitations on placing rated orders*

Consistent with DPAS regulations at 15 CFR 700.18, section 333.18 prohibits the use of rated orders under specific circumstances. Paragraph (a) sets forth the general limitations on placing a rated order, and paragraph (b) prohibits the use of rated orders to obtain earlier than needed delivery dates, greater than needed quantities of items, items in advance of the receipt of a rated order, or other specific items.

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<sup>9</sup> See, e.g., 84 FR 52420 (Oct. 2, 2019) (proposed increase to micro-purchase and simplified acquisition thresholds).

*10. Section 333.19 Special provisions applicable to rated orders for third parties.*

In addition to the required language for each rated order regarding third party facilitations provided in section 333.12, FEMA is adding section 333.19 to specifically address rated orders for third parties. Given the unique circumstances faced in the COVID-19 pandemic, it may be necessary or appropriate for FEMA to use its priority rating authority under section 101(a)(1) of the DPA to facilitate the sale of health and medical resources to third parties. FEMA believes that it may be able to use such transactions to assist third parties in obtaining critical health and medical resource supplies as part of the current response for COVID-19. Such transactions may also be useful in other emergency circumstances. Adding a regulatory provision regarding this type of order benefits all parties, by creating a clear framework for such transactions.

Paragraph (a) makes clear that the EMPAS applies to rated orders placed by FEMA or a Delegate Agency to facilitate sales to third parties, unless otherwise specified. Paragraph (b) provides that where FEMA or a Delegate Agency has placed a rated order to facilitate a sale to a third party, the third party will be responsible for satisfying the applicable terms of sale and payment. The Federal Government will not be liable for any failure to meet the terms of sale or payment for rated orders to facilitate sales to third parties. Paragraph (c) provides that FEMA or the Delegate Agency may amend or cancel the rated order pursuant to section 333.16 if the third party is unable to satisfy the applicable terms of sale or payment. Paragraph (c) confirms that an amendment to such an order to provide for delivery to FEMA, the Delegate Agency, or another third party would not constitute a new rated order. FEMA believes these

additional provisions are essential to clarify the requirements for rated orders to facilitate sales to third parties.

In the event that FEMA determines that facilitation of sales to third-parties is necessary or appropriate to support the national defense, this provision of the EMPAS regulations will help clarify the roles and responsibilities of FEMA and/or the Delegate Agency, the third party, and the person(s) receiving the order. FEMA seeks comment on this section.

*E. Subpart E – Special Priorities Assistance*

*1. Section 333.20 General provisions*

Consistent with DPAS regulations at 15 CFR 700.50 and with Department of Agriculture regulations at 7 CFR 789.20, this section lays out how and when FEMA may provide special priorities assistance and how a person should contact FEMA or the Delegate Agency (as appropriate) when seeking assistance. Paragraph (a) describes what special priorities assistance is and the circumstances in which it might be needed. Paragraph (b) explains that special priorities assistance is available for any reason consistent with part 333 and offers specific examples of issues that special priorities assistance may help to resolve, including authorizing the use of priority ratings on orders to obtain items not otherwise ratable under this part. The examples provided in this section are not a full and complete list of the types of issues that special priorities assistance may help to resolve, but merely a sample of common issues offered as guidance. Paragraph (c) provides information about how requests for special priorities assistance may be submitted.

*2. Section 333.21 Requests for priority rating authority*



Consistent with HRPAS regulations at 45 CFR 101.41, this section identifies circumstances in which a person may request authority to use a priority rating on orders to obtain items not normally rated under this part; provides information on where to submit requests for priority rating authority for production or construction equipment and when such orders may be used to lease such equipment; and details when FEMA 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, and lists factors FEMA will consider in deciding whether to grant this authority.

Paragraph (a) provides that when a rated order is likely to be delayed because a person is unable to obtain items not normally rated under this part, the person may request authority to use a priority rating in ordering the items.

Paragraph (b)(1) explains that requests for priority rating authority for production or construction equipment must be submitted to the Department of Commerce using the appropriate form. Paragraph (b)(2) provides that 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.

Paragraph (c) sets forth the requirements for placing a priority rating on an order in advance of the issuance of a rated prime contract. Paragraph (c)(1) provides that upon specific request, FEMA may authorize such a placement to promote the national defense. The requestor must obtain sponsorship of the request from FEMA or the appropriate Delegate Agency, and the requestor must assume any business risk associated with the

advanced placement of rated orders in the event the rated prime contract is not issued. Paragraph (c)(2) contains a statement that must be included in requests for authority to place a priority rating on an order in advance of a rated prime contract. This statement, when included as part of a request, ensures the requestors understand and accept the liability they assume, as required in paragraph (c)(1), for any business risk associated with the advance placement of rated orders in the event the rated prime contract is not issued. Paragraph (c)(3) provides that when reviewing requests for rating authority in advance of a rated prime contract, FEMA will consider, among other things, five specific criteria: the probability that the prime contract will be awarded; the impact of the resulting rated orders on suppliers and on other authorized programs; whether the contractor is the sole source; whether the item being produced has a long lead time; and the time period for which the rating is being requested. Paragraph (c)(4) permits FEMA to require periodic reports on the use of the authority granted under paragraph (c), in order to ensure appropriate oversight. Paragraph (c)(5) requires that when advance rating authority has been granted but a rated prime contract is not issued, the person who requested the advance rating authority must promptly notify all suppliers who have receive rated orders pursuant to the advance rating authority that the priority rating on those orders is cancelled.

### *3. Section 333.22 Examples of assistance*

Consistent with DPAS regulations at 15 CFR 700.52 and HRPAS regulations at 45 CFR 101.42, this section provides a number of examples of situations where special priorities assistance may be provided. Although such assistance may generally be provided for any reason in support of this part, special priorities assistance is usually

provided in situations where there is difficulty obtaining delivery against a rated order by the required delivery date or difficulty locating a supplier for an item needed to fill a rated order. The examples provided in this section are not a full and complete list of the types of assistance available under this subpart, but merely an illustrative sample offered as guidance.

*4. Section 333.23 Criteria for assistance*

Consistent with both DPAS regulations at 15 CFR 700.53 and HRPAS regulations at 45 CFR 101.43, this section provides criteria for granting requests for special priorities assistance. Consistent with the requirements of this part, requests for special priorities assistance must establish that there is an urgent need for the item and that the person making the request has made a reasonable effort to resolve the problem. Requests should also be submitted in a timely manner, to allow sufficient time for FEMA or the Delegate Agency to provide a meaningful resolution to the problem; requests submitted too late to allow for such a resolution waste limited administrative resources and time, both of which are crucial in emergency situations.

*5. Section 333.24 Instances where assistance will not be provided*

Consistent with both DPAS regulations at 15 CFR 700.54 and HRPAS regulations at 45 CFR 101.44, this section makes clear that special priorities assistance is provided at the discretion of FEMA or the Delegate Agency and provides examples of instances in which assistance may not be provided. The examples provided are not a full and complete list of the cases in which assistance may not be provided, but simply a few common cases where assistance is not warranted to meet the objectives of this part, and therefore may not be granted.

## *F. Subpart F – Allocation Actions*

Generally, the standards set forth in Sections 333.30 through 333.32 mirror similar provisions in the DPAS regulations at 15 CFR 700.30 through 700.32 and HRPAS regulations at 45 CFR 101.50 through 101.52 and provide reasonable assurance that allocation orders will be used only in situations where the circumstances justify such orders. Sections 333.33 through 333.36 address the types of allocation orders, elements required for an allocation order, and the process for acceptance, modification, and cancellation of allocation orders.

### *1. Section 333.30 Policy*

The DPAS regulations at 15 CFR 700.30 and HRPAS regulations at 45 CFR 101.50 include statements of allocations policy. Under these provisions, allocation orders will only be used if priorities authority will not provide a sufficient supply of materials, services, or facilities for national defense requirements, or when use of priorities authority will cause a severe and prolonged disruption in the supply of resources available to support normal U.S. economic activities. Allocation orders will not be used to ration materials or services at the retail level. Allocation orders will be distributed equitably among the suppliers of the resource(s) being allocated and will not require any person to relinquish a disproportionate share of the civilian market. Although these policies may be prudent outside the context of a national emergency, and FEMA will strive to abide by such policies to the extent practicable and appropriate, FEMA requires flexibility to depart from them in the emergency context. Many different forms of allocations may need to be exercised in the emergency context when a hazard has occurred or is imminent, including but not limited to, full allocation of the entire supply

of a material, end-use restrictions, conservation measures, set-asides or allotments for emergency requirements, set-asides or allotments for small businesses, inventory restrictions, and other appropriate measures of control as warranted by the emergency conditions. FEMA must be able to order such allocations regardless of whether such allocations implicate paragraphs (a) or (b) of section 333.30.

FEMA has therefore incorporated these general policies in section 333.30, with an exception for emergency situations where a hazard has occurred or is imminent.

*2. Section 333.31 General procedures*

Before FEMA uses its allocations authority to address a supply problem, the agency will develop a plan pursuant to section 333.31 that includes a copy of the written determination that the program or programs to be supported by the allocation action are necessary or appropriate for the national defense, as well as other elements consistent with the requirements found in the DPAS regulations at 15 CFR 700.31 and HRPAS regulations at 45 CFR 101.51.

*3. Section 333.32 Controlling the general distribution of a material in the civilian market*

Section 333.32 prohibits allocation action by FEMA to control the general distribution of a material in the civilian market unless very specific conditions are met. Consistent with DPAS regulations at 15 CFR 700.32, FEMA's Administrator must make a written finding that such material is a scarce and critical material essential to the national defense, and that national defense requirements 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.

With respect to the present COVID-19 emergency, the President has already found that health and medical resources needed to respond to the spread of COVID-19, including personal protective equipment and ventilators, meet the criteria specified in section 101(b) of the Act. The President has specifically delegated, to the Secretary of Health and Human Services and the Secretary of Homeland Security, authority to identify additional specific health and medical resources that meet the criteria of section 101(b). 85 FR 16227 (Mar. 23, 2020) (delegation to HHS); 85 FR 18403 (delegation to DHS). The Administrator has already issued an allocation order on the basis of that Presidential determination and related direction. See 85 FR 20195 (Apr. 10, 2020).<sup>10</sup> Thus, with respect to health and medical resources needed to respond to the spread of COVID-19, no further action under new section 333.32 is necessary.

#### *4. Section 333.33 Types of allocation orders*

Section 333.33 describes the three types of allocation orders that FEMA might issue. The types of allocation orders are a set-aside, a directive, and an allotment. A set-aside is an official action that will require a person to reserve resource capacity in anticipation of receipt of rated orders. An allocation directive is an official action that will require a person to take or refrain from taking certain actions in accordance with its provisions (a directive may, among other things, require a person to stop or reduce production of an item, prohibit the use of selected materials, or divert the use of materials, services, or facilities from one purpose to another). An allotment is an official action that will specify the maximum quantity of a resource authorized for a specific use.

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<sup>10</sup> Although FEMA effectuated such allocation order via a temporary rule that predates the regulations announced here, FEMA retains authority to administer and enforce that allocation order according to its terms, and to issue future allocation orders consistent with the procedures announced here.

Consistent with DPAS regulations at 15 CFR 700.33 and HRPAS regulations at 45 CFR 101.53, FEMA is specifying these three types of allocation orders because it believes that, collectively, they describe the types of actions that might be taken in any situation in which allocation is justified.

5. *Section 333.34 Elements of an allocation order*

FEMA sets forth the elements of an allocation order in section 333.34.

Specifically, FEMA is adopting the DPAS regulation at 15 CFR 700.34 to allow allocation orders to be issued directly to the affected persons or by constructive notice. Pursuant to paragraph (a), all allocation orders must include a detailed description of the required allocation action(s), including its relationship to previously or subsequently received rated and/or unrated orders, and specific start and end calendar dates for each required allocation action. Paragraph (b) sets forth the elements of the allocation order when issued directly to the affected persons, including the necessary statement regarding to whom the allocation order is issued, the purpose of the allocation order (for national defense), a citation to the EMPAS regulations, and the written signature of the Administrator. Paragraph (c) sets forth the elements of the allocation order when issued by constructive notice through publication in the *Federal Register*. Specifically, paragraph (c) requires FEMA to publish a notice in the *Federal Register* with a statement regarding to whom the allocation order is issued, the purpose of the allocation order, a citation to the EMPAS regulations, and the signature of the Administrator.

FEMA is adopting constructive notice to ensure timely notice to impacted persons. Given the unique emergency preparedness, mitigation, response, and recovery

conditions under which FEMA will utilize this authority, the agency believes allowing for constructive notice, similar to the DPAS regulations, is appropriate.

Consistent with DPAS regulations at 15 CFR 700.34 and HRPAS regulations at 45 CFR 101.54, FEMA requires the specific elements for each order because it believes that they provide a proper balance between the need for standards to permit the public to recognize and understand an allocation order if one is issued, and the expectation that any actual allocation orders will have to be tailored to meet unforeseeable circumstances.

*6. Section 333.35 Mandatory acceptance of an allocation order*

Section 333.35(a) requires that except as otherwise specified in this section, an allocation order must be accepted. Section 333.35(b) prohibits persons from discriminating against an allocation order in any manner, such as by charging higher prices or imposing terms and conditions different than what the person imposed on contracts or orders for the same resource(s) that were received prior to receiving the allocation order. If a person is unable to comply fully with the required actions specified in an allocation order, Section 333.35(c) requires the person to notify FEMA immediately, explain the extent to which compliance is possible, and give reasons why full compliance is not possible. FEMA is adopting the requirement that if such notification is given verbally, written electronic confirmation must be provided within 24 hours (rather than the one-working-day requirement in the DPAS regulations) given the urgency with which emergency preparedness, mitigation, response, and recovery operations must occur and the need for clear, reliable statements regarding such delays to ensure the ultimate timely delivery of these operations. Section 333.35 makes it clear to the public that the limited circumstances and emergency situations that trigger issuance of



an allocation order require immediate response to address the situation in an expeditious fashion.

*7. Section 333.36 Changes or cancellations of allocation orders*

Section 333.36 requires an official action from FEMA to change or cancel an allocation order. Consistent with DPAS regulations at 15 CFR 700.36, FEMA is allowing notice of changes or cancellations of allocation orders to be provided either directly to persons to whom the order applies or by constructive notice. FEMA may complete constructive notice by publication in the *Federal Register*.

*G. Subpart G [Reserved]*

*H. Subpart H – Official Actions*

*1. Section 333.50 General provisions*

From time to time, FEMA may take specific official actions to implement or enforce the EMPAS regulations. Consistent with DPAS regulations at 15 CFR 700.60, Section 333.50 provides an overview of this subpart and clarifies in paragraph (b) that some official actions pertaining to compliance are discussed in section 333.61, which is in Subpart I.

*2. Section 333.51 Rating authorizations*

Consistent with both the DPAS regulations at 15 CFR 700.61 and HRPAS regulations at 45 CFR 101.61, section 333.51 defines a rating authorization as an official action granting specific priority rating authority and refers persons to section 333.21 to request such priority rating authority.

*3. Section 333.52 Directives*

Section 333.52(a) defines a directive as an official action that requires a person to take or refrain from taking certain actions in accordance with its provisions. Paragraph (b) details directive compliance for the public, prohibiting persons from using or extending a directive to obtain items from a supplier, unless expressly authorized to do so in the directive. Consistent with HRPAS regulations at 45 CFR 101.62(c) and (d), FEMA is clarifying in paragraph (c) that a priorities directive takes precedence over all rated orders, and unrated orders previously or subsequently received, unless a contrary instruction appears in the directive. FEMA is also clarifying in paragraph (d) that an allocations directive takes precedence over all priorities directives, rated orders, and unrated orders previously or subsequently received, unless a contrary instruction appears in the directive. FEMA believes this additional clarification helps better explain the role of directives in the EMPAS process.

#### *4. Section 333.53 Letters and Memoranda of Understanding*

Consistent with HRPAS regulations at 45 CFR 101.63, FEMA defines a letter or memorandum of understanding as an official action that may be issued to resolve special priorities assistance cases to reflect an agreement reached by all parties, and explains its use. FEMA is clarifying in paragraph (a) that letters and memorandum of understanding may be issued electronically for efficiency. Given the urgency with which emergency preparedness, response, and recovery operations must occur, FEMA believes written electronic communication is the most efficient and effective method for these official actions.

#### *I. Subpart I – Compliance*

##### *1. Section 333.60 General provisions*

This section details the actions which may be taken by FEMA to enforce or administer the DPA and other applicable statutes. FEMA is clarifying in paragraph (a) that compliance actions include audits, investigations, and other inquiries. The agency may use other official actions such as administrative subpoenas, demands for information, or inspection authorizations as part of the compliance process. Consistent with HRPAS regulations at 45 CFR 101.70(b), paragraph (b) reiterates that any person who places or receives a rated order or an allocation order must comply with this part and paragraph (c) states that willful violation of the provisions of title I or section 705 of the DPA or other applicable statutes, this part, or a FEMA official action is a criminal act punishable as provided in the DPA and other applicable statutes. FEMA is mirroring the HRPAS regulations at 45 CFR 101.70(b) and (c) in paragraphs (b) and (c) as they provide clarity to the public regarding the need for compliance and the repercussions of failing to comply.

*2. Section 333.61 Audits and investigations*

Consistent with the DPAS regulations at 15 CFR 700.71 and HRPAS regulations at 45 CFR 101.71, Section 333.61 details the procedures for audits and investigations. Paragraph (a) defines audits and investigations as official actions involving the examination of books, records, documents, and other writings and information, including electronically stored information, to ensure that the provisions of the DPA and other applicable statutes, this part, and official actions taken by FEMA 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. Paragraph (b) explains that FEMA will define the scope and purpose in the official action given to the person

under investigation and confirm that the information sought is not available from any Federal or other responsible agency. Consistent with HRPAS regulations at 45 CFR 101.71(c), paragraph (c) discusses how FEMA will administer audits and investigations, including how the agency will utilize administrative subpoenas, demands for information, and inspection authorizations. Paragraph (d) discusses how writings and information will be reviewed and paragraph (e) details the required elements of administrative subpoenas, demands for information, and inspection authorizations. Paragraph (f) provides an explanation of how service of documents will be made. As compared to other FPAS regulations, paragraph (f) contains an additional flexibility appropriate to FEMA's emergency response functions. Specifically, this paragraph provides that when a hazard has occurred or is imminent, service of a demand for information or inspection authorization may additionally be made by written electronic communication.

### *3. Section 333.62 Compulsory process*

Paragraph (a) of section 333.62 provides that if a person refuses to permit a duly authorized FEMA representative to have access to necessary information, FEMA may seek to institute appropriate legal action, including *ex parte* application for an inspection warrant, in any forum of appropriate jurisdiction. Consistent with DPAS regulations at 15 CFR 700.72(b), paragraph (b) explains that compulsory process may be sought in advance of an audit, investigation, or other inquiry if in the judgment of the Administrator, in consultation with the FEMA Chief Counsel, there is a reason to believe that a person will refuse to permit an audit, investigation, or other inquiry, or that other circumstances exist which make such process desirable or necessary.

### *4. Section 333.63 Notification of failure to comply*

Consistent with HRPAS regulations at 45 CFR 101.73, section 333.63(a) states that FEMA may provide notification, following an audit, investigation, or other inquiry, of failure to comply with the DPA, other applicable statutes, these regulations, or official actions. FEMA has revised paragraph (a), as compared to other FPAS regulations, to make clear that FEMA may provide such notification irrespective of whether the person's failure to comply was inadvertent or willful. Paragraph (b) permits FEMA to allow for corrective action to be taken for an inadvertent failure to comply with the DPA, and notes that failure to take corrective action may be construed as willful violation of the relevant authority.

*5. Section 333.64 Violations, penalties, and remedies*

Section 333.64 describes the resulting penalties and remedies for failure to comply, as well as other measures that may be taken and actions that are prohibited. FEMA is mirroring the HRPAS regulations at 45 CFR 101.74 for this section.

*6. Section 333.65 Compliance conflicts*

This section requires that persons immediately contact FEMA should compliance with the DPA or other applicable statutes, this part, or an official action prevent a person from filling a rated order or from complying with another provision of the DPA or other applicable statutes, this part, or an official action.

*J. Subpart J- Adjustments, Exceptions, and Appeals*

*1. Section 333.70 Adjustments or exceptions*

Section 333.70 reflects the procedures necessary to request an adjustment or exception to the provisions of these regulations. Paragraph (a) allows a person to submit a request to FEMA for an adjustment or exception where (1) a provision of this part or an

official action results in undue or exceptional hardship 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 DPA and other applicable statutes, or this part. Paragraph (b) details the required elements of each request for adjustment or exception. Paragraph (c) explains that a request for adjustment of exception does not relieve any person from the obligation of complying while the request is being considered, unless interim relief is granted in writing. Similar to the corresponding HRPAS provision at 45 CFR 101.80(c), and in contrast to the corresponding DPAS provision at 15 CFR 700.80(c), FEMA does not impose a specific deadline for responding to such a request, to provide maximum flexibility in the event of a surge in such requests. FEMA intends to respond to all such requests within a reasonable timeframe. Paragraph (d) states that decisions may be appealed to the Administrator.

## *2. Section 333.71 Appeals*

This section provides the procedures, timing, and contact information for appealing a decision made on a request for relief in the previous section and is generally consistent with DPAS regulations at 15 CFR 700.81 and HRPAS regulations at 45 CFR 101.81. Paragraph (b) incorporates the timeline in HRPAS regulations for adjustment or exception involving rated orders placed for the purpose of health and medical resources, set at 15 days after receipt of a written notice of denial consistent with the exigent circumstances under which FEMA is operating in emergency preparedness situations where a hazard has occurred or is imminent. Paragraph (g) reiterates that filing an appeal does not relieve any obligation to comply with the provisions of this part or any official

action in question while the appeal is being considered, unless such relief is granted in writing by FEMA. Paragraph (h) incorporates the requirements from the DPAS regulations at 15 CFR 700.81(h) that a decision be made in writing within a reasonable time after receipt of the appeal and shall be the final administrative action.

*K. Subpart K – Miscellaneous Provisions*

*1. Section 333.80 Protection against claims*

Consistent with DPAS regulations at 15 CFR 700.90 and HRPAS regulations at 45 CFR 101.90, this section provides that a person shall not be held liable for damages or penalties for any act or failure to act resulting directly or indirectly from compliance with any part of this regulation or an official action.

*2. Section 333.81 Records and reports*

Section 333.81 requires persons to make and preserve for at least three years, accurate and complete records of any transaction covered by this part or an official action. Various requirements and procedures regarding such records are provided in this section. The confidentiality provisions of the DPA governing the disclosure of information submitted pursuant to the DPA and this part are also set forth. Although the corresponding DPAS provision at 15 CFR 700.91(e) applies to “information obtained under this section [15 CFR 700.91],” the confidentiality provisions of section 705(d) of the Act apply to all information obtained under section 705. FEMA’s section 333.81(e) therefore refers to all information obtained under section 705 of the act, rather than information obtained under 44 CFR 333.81.

*3. Section 333.82 Applicability of this part and official actions*

Consistent with the DPAS regulations at 15 CFR 700.92 and HRPAS regulations at 101.92, section 333.82 provides the scope and jurisdictional applicability of this part and official actions.

*4. Section 333.83 Communications*

Section 333.83 provides a FEMA point of contact for general communications regarding this part.

*5. Section 333.84 Severability*

Section 333.84 provides that FEMA intends the various provisions of this part to be severable from each other to the extent practicable, such that if a court of competent jurisdiction were to vacate or enjoin any one provision, the other provisions are intended to remain in effect unless they are dependent upon the vacated or enjoined provision.

**IV. Regulatory Analysis**

*A. Administrative Procedure Act (APA)*

For the reasons that follow, FEMA is issuing this rule as an interim final rule pursuant to the APA's "good cause" exception for rules with respect to which "notice and public procedure" is "impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. 553(b)(B).

Under section 709(a) of the Act (50 U.S.C. 4559(a)), rules implementing the DPA are generally not subject to sections 551 through 559 of title 5, which includes the informal rulemaking procedures of the Administrative Procedure Act (APA) at 5 U.S.C. 553. However, section 101(d)(1) of the DPA, which this rule specifically implements, contains an exception to section 709(a), because it specifically directs resource agencies to issue, "in accordance with section 553 of title 5," rules establishing the standards and



procedures by which the priorities and allocations authority is used to promote the national defense, under both emergency and nonemergency conditions. FEMA is issuing this interim final rule “in accordance with” the requirements of 5 U.S.C. 553, including the good cause provisions in 5 U.S.C. 553(b)(B) and (d).

The exigent need for this rule is related to the COVID-19 pandemic. COVID-19 is a communicable disease caused by a novel (new) coronavirus, SARS-CoV-2, that was first identified as the cause of an outbreak of respiratory illness that began in Wuhan, Hubei Province, People’s Republic of China. In severe cases, manifestations of the COVID-19 disease have included severe pneumonia, acute respiratory distress syndrome, septic shock, multi-organ failure, and death.

On January 30, 2020, the Director General of WHO declared that the outbreak of COVID-19 is a Public Health Emergency of International Concern under the International Health Regulations.<sup>11</sup> The following day, the Secretary of HHS declared COVID-19 a public health emergency under the Public Health Service Act.<sup>12</sup> On March 11, 2020, the WHO declared COVID-19 a pandemic.<sup>13</sup> On March 13, 2020, the President declared a national emergency under the National Emergencies Act (50 U.S.C. 1601 *et seq.*),<sup>14</sup> and declared a nationwide emergency under the Robert T. Stafford Disaster

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<sup>11</sup> Statement on the second meeting of the International Health Regulations (2005) Emergency Committee regarding the outbreak of novel coronavirus (2019-nCoV) (January 30, 2020), available at [https://www.who.int/news-room/detail/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-\(2005\)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-\(2019-ncov\)](https://www.who.int/news-room/detail/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-(2019-ncov)).

<sup>12</sup> HHS, “Determination that a Public Health Emergency Exists,” available at <https://www.phe.gov/emergency/news/healthactions/phe/Pages/2019-nCoV.aspx>.

<sup>13</sup> “WHO Director-General’s opening remarks at the media briefing on COVID-19 - 11 March 2020,” available at <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>.

<sup>14</sup> “Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak,” March 13, 2020, available at <https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/>.

Relief and Emergency Assistance Act (42 U.S.C. 5121 *et seq.*), authorizing FEMA to provide assistance for emergency protective measures to respond to the COVID-19 pandemic.<sup>15</sup>

The President exercised his authority pursuant to the DPA to respond to the COVID-19 pandemic in Executive Orders 13909 and 13910, authorizing the Secretary of Health and Human Services to prioritize and allocate health and medical resources under section 101 of the DPA and prevent hoarding of such resources under section 102 of the DPA to respond to the spread of COVID-19.<sup>16</sup> In Executive Order 13911, the President delegated additional authority under the DPA, including delegating to the Secretary of Homeland Security the authority conferred by section 101 of the DPA. The President has also delegated to the Secretary of Homeland Security the authority to promulgate regulations necessary to implement the Executive Order. The Secretary of Homeland Security has further delegated this authority to the FEMA Administrator.<sup>17</sup> Any future COVID-19-related orders or allocations pursued under these delegations of authority would occur within the context of the framework established by these regulations.

As of April 30, 2020, there were over 1 million confirmed cases of COVID-19 reported in the United States, resulting in over 60,000 confirmed deaths due to the disease, with new cases reported daily.<sup>18</sup> Worldwide there have been over 3 million

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<sup>15</sup> “Letter from President Donald J. Trump on Emergency Determination Under the Stafford Act,” March 13, 2020, available at <https://www.whitehouse.gov/briefings-statements/letter-president-donald-j-trump-emergency-determination-stafford-act/>.

<sup>16</sup> Executive Order 13909, 85 FR 16227 (Mar. 23, 2020); Executive Order 13910, 85 FR 17001 (Mar. 26, 2020).

<sup>17</sup> DHS Delegation 09052 Rev. 00.1 (Apr. 1, 2020).

<sup>18</sup> Information obtained from <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html> (accessed April 30, 2020).

confirmed cases, resulting in over 217,000 deaths.<sup>19</sup> At this time, there is no vaccine that can prevent infection with COVID-19. Treatment is mainly limited to supportive (or palliative) care for patients who need it. Clinical management for hospitalized patients with COVID-19 is focused on supportive care for complications, including supplemental oxygen and advanced organ support for respiratory failure, septic shock, and multi-organ failure.<sup>20</sup>

Within the United States, widespread transmission of COVID-19 has occurred. Such transmission has resulted and will continue to result in large numbers of people needing medical care at the same time. Public health and healthcare systems may become overloaded, with elevated rates of hospitalizations and deaths, as well as elevated demand for health and medical resources.

To summarize, the current situation is such that FEMA must establish the relevant regulatory framework without delay, so as to be able to respond with dispatch and without unnecessary confusion regarding the applicable standards and procedures. The Federal Government urgently needs to address issues related to production and distribution of critical medical supplies, equipment, and facilities associated with the response to COVID-19. FEMA has the lead role in coordinating the Federal response to COVID-19 and requires a clear, robust, and enforceable mechanism for exercising its authority under section 101 of the DPA and other applicable authorities. Given the national emergency caused by COVID-19, it would be impracticable and contrary to the public health—and, by extension, the public interest—to delay these implementing

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<sup>19</sup> Information obtained from <https://covid19.who.int/> (accessed April 30, 2020).

<sup>20</sup> Information obtained from <https://www.cdc.gov/coronavirus/2019-ncov/hcp/clinical-guidance-management-patients.html> (accessed April 30, 2020).

regulations until a full public notice-and-comment process is completed. Pursuant to 5 U.S.C. 553(b)(B), consistent with sections 101(d)(1) of the DPA, and for the reasons stated above, FEMA therefore concludes that there is good cause to dispense with prior public notice and the opportunity to comment on this rule before finalizing this rule. For the same reasons, FEMA has determined, pursuant to section 553(d) of the APA, that there is good cause to make this interim final rule effective immediately upon publication.

While FEMA believes that there is good cause to issue the rule without advance notice and comment and with an immediate effective date, FEMA is interested in the views of the public and requests comment on all aspects of the interim final rule.

*B. Executive Order 12866, Regulatory Planning and Review, Executive Order 13563, Improving Regulation and Regulatory Review, and Executive Order 13771, Reducing Regulation and Controlling Regulatory Costs*

Executive Orders 12866 (“Regulatory Planning and Review”) and 13563 (“Improving Regulation and Regulatory Review”) direct agencies to assess the 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. Executive Order 13771 (“Reducing Regulation and Controlling Regulatory Costs”) directs agencies to reduce regulation and control regulatory costs and provides that “for every one new regulation issued, at least two prior regulations be identified for elimination, and that the

cost of planned regulations be prudently managed and controlled through a budgeting process.”

This interim final rule has been drafted and reviewed in accordance with Executive Order 12866. DHS, in coordination with the Office of Management and Budget (OMB), has determined this rule to be an economically significant regulatory action as defined in Section 3(f) of the Executive Order. Although this rule has been deemed economically significant, FEMA proceeds without additional economic analysis under the emergency provision of section 6(a)(3)(D) of Executive Order 12866, for the reasons stated in the APA section above.

*C. Regulatory Flexibility Act*

The Regulatory Flexibility Act (RFA) (5 U.S.C. 605(b)) requires an agency to consider whether the rules it proposes will have a significant economic impact on a substantial number of small entities. The RFA applies only to rules for which an agency publishes a general notice of proposed rulemaking pursuant to 5 U.S.C. 553(b). As discussed previously, FEMA is not issuing a notice of proposed rulemaking. Accordingly, FEMA has concluded that the RFA's requirements relating to initial and final regulatory flexibility analysis do not apply.

Nevertheless, FEMA seeks comment on whether, and the extent to which, the interim final rule would have a significant economic impact on a substantial number of small entities.

*D. Unfunded Mandates Reform Act of 1995*

FEMA has not issued a notice of proposed rulemaking for this regulatory action; therefore, the written statement provisions of the Unfunded Mandates Reform Act of 1995, as amended, do not apply to this regulatory action.

*E. Paperwork Reduction Act of 1995*

This rule contains information collections necessary to support FEMA's implementation of the President's priorities and allocations authority under Title I of the Defense Production Act of 1950 (DPA), as amended (50 U.S.C. 4501, *et seq.*). The purpose of this authority is to ensure the timely delivery of products, materials, and services necessary or appropriate to promote the national defense.

This new collection was submitted under OMB's emergency clearance procedures. Additionally, FEMA will seek public comments on the collection through the normal clearance process.

*F. Privacy Act*

Under the Privacy Act of 1974, 5 U.S.C. 552a, an agency must determine whether implementation of a proposed regulation will result in a system of records. A "record" is any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his/her education, financial transactions, medical history, and criminal or employment history and that contains his/her name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph. See 5 U.S.C. 552a(a)(4). A "system of records" is a group of records under the control of an agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other

identifying particular assigned to the individual. An agency cannot disclose any record which is contained in a system of records except by following specific procedures.

In accordance with DHS policy, FEMA has completed a Privacy Threshold Analysis (PTA) for this rule. DHS has determined that this rulemaking does not affect the 1660-NW122 OMB Control Number's compliance with the E-Government Act of 2002 or the Privacy Act of 1974, as amended. Specifically, DHS has concluded that the 1660-NW122 OMB Control Number is covered by the DHS/ALL/PIA-065 Electronic Contract Filing System (ECFS) Privacy Impact Assessment (PIA). Additionally, DHS has decided that the 1660-NW122 OMB Control Number is covered by the DHS/ALL-021 Department of Homeland Security Contractors and Consultants, 73 FR 63179 (Oct. 23, 2008) System of Records Notice (SORN).

*G. Executive Order 13175, Consultation and Coordination with Indian Tribal Governments*

Executive Order 13175, "Consultation and Coordination with Indian Tribal Governments," 65 FR 67249, November 9, 2000, applies to agency regulations that have Tribal implications, that is, regulations that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes. Under this Executive Order, to the extent practicable and permitted by law, no agency shall promulgate any regulation that has Tribal implications, that imposes substantial direct compliance costs on Indian Tribal governments, and that is not required by statute, unless funds necessary to pay the direct costs incurred by the Indian Tribal

government or the Tribe in complying with the regulation are provided by the Federal Government, or the agency consults with Tribal officials.

FEMA has reviewed this interim final rule under Executive Order 13175 and has determined that this interim final rule does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes.

#### *H. Executive Order 13132, Federalism*

Executive Order 13132, “Federalism,” 64 FR 43255, August 10, 1999, sets forth principles and criteria that agencies must adhere to in formulating and implementing policies that have federalism implications, that is, regulations that have “substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.” Federal agencies must closely examine the statutory authority supporting any action that would limit the policymaking discretion of the States, and to the extent practicable, must consult with State and local officials before implementing any such action.

FEMA has determined that this rulemaking does not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, and therefore does not have federalism implications as defined by the Executive Order.

#### *I. National Environmental Policy Act of 1969 (NEPA)*



Under the National Environmental Policy Act of 1969 (NEPA), as amended, 42 U.S.C. 4321 *et seq.*, an agency must prepare an environmental assessment or environmental impact statement for any rulemaking that significantly affects the quality of the human environment. FEMA has determined that this rulemaking does not significantly affect the quality of the human environment and consequently has not prepared an environmental assessment or environmental impact statement.

Rulemaking is a major Federal action subject to NEPA. Categorical exclusion A3 included in the list of exclusion categories at Department of Homeland Security Instruction Manual 023-01-001-01, Revision 01, Implementation of the National Environmental Policy Act, Appendix A, issued November 6, 2014, covers the promulgation of rules, issuance of rulings or interpretations, and the development and publication of policies, orders, directives, notices, procedures, manuals, and advisory circulars if they meet certain criteria provided in A3(a-f). This interim final rule meets Categorical Exclusion A3(a), “[t]hose of a strictly administrative or procedural nature,” and A3(b), “[t]hose that implement, without substantive change, statutory or regulatory requirements.”

#### *J. Congressional Review of Agency Rulemaking*

Under the Congressional Review of Agency Rulemaking Act (CRA), 5 U.S.C. 801-808, before a rule can take effect, the Federal agency promulgating the rule must: submit to Congress and to the Government Accountability Office (GAO) a copy of the rule; a concise general statement relating to the rule, including whether it is a major rule; the proposed effective date of the rule; a copy of any cost-benefit analysis; descriptions of the agency’s actions under the Regulatory Flexibility Act and the Unfunded Mandates

Reform Act; and any other information or statements required by relevant executive orders.

FEMA has submitted this rule to the Congress and to GAO pursuant to the CRA. The Office of Management and Budget has determined that this rule is a “major rule” within the meaning of the CRA. Pursuant to 5 U.S.C. 808(2), since this rule is promulgated under the “good cause” exemption of the APA, there is no delay in its effective date under the CRA.

List of Subjects in 44 CFR Part 333

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

For the reasons discussed in the preamble, the Federal Emergency Management Agency (FEMA) adds part 333 to subchapter F of title 44 of the Code of Federal Regulations, to read as follows:

**PART 333 -- EMERGENCY MANAGEMENT PRIORITIES AND  
ALLOCATIONS SYSTEM**

**Subpart A—Purpose  
Sec.**

333.1 Purpose of this part.

**Subpart B—Overview**

333.2 Program Eligibility.

333.3 Priority ratings and rated orders.

333.4-333.7 [Reserved]

**Subpart C—Definitions**

333.8 Definitions.

**Subpart D—Priorities and Placement of Rated Orders**

333.10 Authority.

- 333.11 Priority ratings.
- 333.12 Elements of a rated order.
- 333.13 Acceptance and rejection of rated orders.
- 333.14 Preferential scheduling.
- 333.15 Extension of priority ratings.
- 333.16 Changes or cancellations of priority ratings and rated orders.
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**Authority:** 6 U.S.C. 313, 314; Sections 101 *et seq.* of the Defense Production Act of 1950, 50 U.S.C. 4511, *et seq.*; Executive Order 13603, 77 FR 16651 (Mar. 22, 2012); Executive Order 13909, 85 FR 16227 (Mar. 23, 2020); Executive Order 13911, 85 FR 18403 (Apr. 1, 2020); DHS Delegation 09052, Rev. 00.1 (Apr. 1, 2020).

## **Subpart A—Purpose**

### **§333.1 Purpose of this part.**

The Federal Emergency Management Agency (FEMA) refers to this part as the Emergency Management Priorities and Allocations System (EMPAS). The EMPAS implements those priorities and allocations authorities under the Defense Production Act that are the subject of a delegation from the President to the Secretary of DHS and re-delegated to the FEMA Administrator, or to the FEMA Administrator directly, as described in § 333.10 of this part. This includes the use of authority to support critical infrastructure restoration and protection, stockpiling, and emergency preparedness activities pursuant to Title VI of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5195 *et seq.*), and related statutes, with respect to health and medical resources needed to respond to the spread of COVID-19 within the United States.

## **Subpart B—Overview**

### **§333.2 Program Eligibility.**

(a) Certain programs to 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,

deployment and sustainment of military forces, homeland security, stockpiling, space, and any directly related activity. Other eligible programs include emergency preparedness activities conducted pursuant to Title VI of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5195 *et seq.*) and critical infrastructure protection and restoration. For a current and complete list reflecting the latest changes to approved programs, please visit FEMA's website at [www.FEMA.gov](http://www.FEMA.gov).

(b) FEMA may delegate authority to place priority ratings on contracts or orders necessary to promote the national defense to appropriate officials in certain Federal Government agencies that issue such contracts or orders, to the extent consistent with the delegation of Presidential authority under which FEMA is operating. Such delegations may include authority to authorize recipients of rated orders to place ratings on contracts or orders to contractors, subcontractors, and suppliers.

### **§333.3 Priority ratings and rated orders.**

(a) Rated orders are identified by a priority rating and a program identification symbol. Rated orders take precedence over all unrated orders as necessary to meet required delivery dates. Among rated orders, DX rated orders take precedence over DO rated orders.

(b) Persons receiving rated orders must give them preferential treatment as required by this part.

(c) All rated orders must be scheduled to the extent possible to ensure delivery by the required delivery date.

(d) Persons who receive rated orders must in turn place rated orders with their suppliers for the items they need to fill the orders. This provision ensures that suppliers

will give priority treatment to rated orders from contractor to subcontractor to suppliers throughout the procurement chain.

(e) Persons may place a priority rating on orders only when they are in receipt of a rated order, have been explicitly authorized to do so by FEMA or a Delegate Agency, or are otherwise permitted to do so by this part.

#### **§§333.4-333.7 [Reserved]**

### **Subpart C—Definitions**

#### **§333.8 Definitions.**

The definitions in this section apply throughout this part:

*Act or DPA* means the Defense Production Act of 1950, as amended (50 U.S.C. 4501, *et seq.*).

*Administrator* means the Administrator of the Federal Emergency Management Agency.

*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 of a material, service, or facility authorized for a specific use to promote the national defense.

*Approved program* means a program determined as necessary or appropriate for priorities and allocations support to promote the national defense by the Secretary of

Defense, the Secretary of Energy, or the Secretary of Homeland Security, under the authority of the Defense Production Act and Executive Order 13603.

*Construction* means the erection, addition, extension, or alteration of any building, structure, or project, using materials or products which 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.

*Delegate Agency* means a Federal Government agency authorized by delegation from FEMA to place priority ratings on contracts or orders needed to support approved programs.

*Directive* means an official action which requires a person to take or refrain from taking certain actions in accordance with its 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 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. “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 firefighting, 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).

*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 related to the use of any such building, structure, or other improvement.

*Hazard* means an emergency or disaster resulting from:

- (1) A natural disaster, or
- (2) An accidental or man-caused event.

*Health and medical resources* means drugs, biological products, medical devices, materials, facilities, health supplies, services, and equipment required to diagnose,



mitigate, prevent the impairment of, improve, treat, cure, or restore the physical or 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 health resources; all forms of civil transportation; and water resources. This term also includes the term “item” as defined and used in this part.

*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.

*Maintenance and repair and/or operating supplies (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 items 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 which 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 Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5195 *et seq.*) and critical infrastructure protection and restoration.

*Official action* means an action taken by FEMA under the authority of the Defense Production Act, the Robert T. Stafford Disaster Relief and Emergency Assistance Act and related statutes, or this part. Such actions include the issuance of rating

authorizations, directives, letters and memoranda of understanding, demands for information, inspection authorizations, administrative subpoenas, and allocation orders.

*Person* includes any 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; and for purposes of administration of this part, includes the Federal Government and any authorized foreign government or international organization or agency thereof, delegated authority as provided in this part.

*Priorities authority* means the authority of FEMA, pursuant to Section 101 of the Defense Production Act, to require acceptance and priority performance of contracts and orders for health and medical resource items and other resources as further delegated by the President to the Secretary of Homeland Security or Administrator for use in approved programs.

*Priority rating* means an identifying code assigned by a Delegate Agency, FEMA, or authorized person placed on all rated orders and consisting of the rating symbol and the program identification symbol.

*Production equipment* means any item of capital equipment used in producing materials or furnishing services that has a unit acquisition cost of \$2,500 or more, an anticipated service life in excess of one year, and the potential for maintaining its integrity as a capital item.

*Program identification symbols* means abbreviations used to indicate which approved program is supported by a rated order.

*Rated order* means a prime contract, a subcontract, or a purchase order in support of an approved program issued in accordance with the provisions of this part.

*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.

*Written* and *in writing* mean documented via printing, typewriting, handwriting, or similar means, whether in tangible or electronic form.

*Written electronic* means written and in electronic form, except that when electronic form is impracticable under the circumstances, FEMA may construe this term to allow for a tangible format.

#### **Subpart D—Priorities and placement of rated orders**

##### **§333.10 Authority.**

(a) The priorities and allocations authorities of the President under Title I of the Act that have been delegated to the Secretary of Homeland Security have been redelegated to the Administrator. These rules are issued pursuant to Title I of the Act, and implementing authorities, including such authorities as are contained in subchapter III of chapter 55 of title 50, United States Code (50 U.S.C. 4554, 4555, 4556, and 4560), which have been delegated to FEMA.

(b) *Delegations by FEMA.* FEMA may authorize Delegate Agencies to assign priority ratings to orders under these regulations as authorized.

(c) *Jurisdictional limitations.* Unless delegated by the President to DHS or FEMA, the provisions of this part are not applicable to the following resource categories, as defined in Executive Order 13603, a successor executive order, or implementing regulations issued thereunder:

(1) Food resources, food resource facilities, and the domestic distribution of farm equipment and commercial fertilizer (Resource department with jurisdiction – Department of Agriculture);

(2) Energy supplies (Resources agency with jurisdiction – Department of Energy);

(3) All forms of civil transportation (Resource department with jurisdiction – Department of Transportation);

(4) Health resources (Resource department with jurisdiction – Department of Health and Human Services), except that pursuant to Executive Order 13911, the provisions of this part are applicable to health and medical resources needed to respond to the spread of COVID-19;

(5) Water resources (Resource department with jurisdiction – Department of Defense); and

(6) All other materials, services, and facilities, including construction materials (“industrial resources”) (Resource department with jurisdiction – Department of Commerce).

**§333.11 Priority ratings.**

(a) *Levels of priority.* (1) There are two levels of priority established by Federal Priorities and Allocations System regulations, identified by the rating symbols “DO” and “DX.”

(2) All DO rated orders have equal priority with each other and take preference over unrated orders. All DX rated orders have equal priority with each other and take preference over DO rated orders and unrated orders. (For resolution of conflicts among rated orders of equal priority, see §333.14(c)).

(3) In addition, a Directive issued by FEMA regarding priority treatment for a given item takes preference over any DX rated order, DO rated order, or unrated order, as stipulated in the Directive. (For a full discussion of Directives, see §333.52).

(b) *Program identification symbols.* Program identification symbols indicate which approved program is being supported by a rated order. Program identification symbols, in themselves, do not connote any priority.

(c) *Priority ratings.* A priority rating consists of the rating symbol—DO or DX—and the program identification symbol.

### **§333.12 Elements of a rated order.**

(a) *Elements required for all rated orders.* (1) The appropriate priority rating and program identification symbol;

(2) A required delivery date or dates. The words “immediately” or “as soon as possible” do not constitute a delivery date. When a “requirements contract,” “basic ordering agreement,” “prime vendor contract,” or similar procurement document bearing a priority rating contains no specific delivery date or dates, but provides for the

furnishing of items from time-to-time or within a stated period against specific purchase orders, such as “calls,” “requisitions,” and “delivery orders,” the purchase orders under such contracts or agreements 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, manual or digital, certifies that the rated order is authorized under this part and that the requirements of this part are being followed; and

(4) A statement that reads in substance: “This is a rated order certified for national defense use and you are required to follow all the provisions of the Emergency Management Priorities and Allocations System regulations (44 CFR part 333).”

*(b) Additional element required for certain emergency preparedness rated orders.* If a rated order is placed for the purpose of emergency preparedness requirements and expedited action is necessary or appropriate to meet these requirements, the following statement must be included in the order: “This rated order is placed for the purpose of emergency preparedness. It must be accepted or rejected pursuant to the mandatory acceptance and mandatory rejection requirements found in 44 CFR 333.13 within [Insert a time limit no less than the minimum applicable time limit specified in §333.13(d)(2)].”

*(c) Additional elements required for rated orders issued by FEMA or a Delegate Agency to facilitate sales to third parties.* If a rated order is placed by FEMA or the Delegate Agency to facilitate a sale to a third party who desires to order the materials, the

following statement must also be included in the order: “This rated order is placed for the purpose of facilitating a sale to [Insert third party] to promote the national defense. It must be accepted or rejected pursuant to the mandatory acceptance and mandatory rejection requirements found in 44 CFR 333.13 within [Insert the applicable time limit consistent with §333.13(d)], and it is subject to the additional requirements of 44 CFR 333.19. [Third party] is responsible for satisfying the applicable terms of sale and payment. The Federal Government is not be liable for any failure to meet the terms of sale or payment. For purposes of these and any other notification requirements set forth in FEMA’s Emergency Management Priorities and Allocations System regulations (44 CFR part 333), both [Insert FEMA or Delegate Agency] and [Insert third party] are the ‘customer.’”

**§333.13 Acceptance and rejection of rated orders.**

(a) *Mandatory acceptance.* (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 must 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 FEMA:

(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 under this section.

(2) A person must not accept a DO rated order for delivery on a date which 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 which 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 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 which 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.

(c) *Optional rejection.* Unless otherwise directed by FEMA, 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 performed;

(3) If the order is for an item produced, acquired, or provided only for the supplier's own use for which no orders have been filled for two years prior to the date of receipt of

the rated order. If, however, a supplier has sold some of these items, the supplier is obligated to accept rated orders up to that quantity or portion of production, whichever is greater, sold within the past two 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 FEMA issued under the authority of the Defense Production Act or another relevant statute.

(d) *Customer notification requirements.* (1) Except as provided in paragraph (d)(2) of this section, a person must accept or reject a rated order in written electronic format within 15 working days after receipt of a DO rated order and within 10 working days after receipt of a DX rated order. If the order is rejected, the person must give reasons in written electronic format for the rejection.

(2) If a rated order is placed for the purpose of emergency preparedness requirements and expedited action is necessary or appropriate to meet these requirements and the order includes the statement set forth in §333.12(b), a person must accept or reject the rated order and transmit the acceptance or rejection in written electronic format within the time specified in the rated order. The minimum times for acceptance or rejection that such orders may specify are 6 hours after receipt of the order if the order is issued by an authorized person in response to a hazard that has occurred, or 12 hours after receipt if the order is issued by an authorized person to prepare for an imminent hazard.

(3) 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 electronic confirmation must be provided within 24 hours of the verbal notice.

**§333.14 Preferential scheduling.**

(a) A person must schedule operations, including the acquisition of all needed production items, 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 against unrated orders. Similarly, DX rated orders must be given preference over DO rated orders and unrated orders.

(1) *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. However, if business operations cannot be altered to meet both the June 3 and July 15 delivery dates, then the DX rated order must be given priority over the DO rated order.

(2) [Reserved]

(c) *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 preference to the conflicting orders in the sequence in which they are to be delivered or performed (not to the receipt dates). If the conflicting rated orders are scheduled to be delivered or performed on the same day, the person must give preference to those orders which have the earliest receipt dates.

(2) If a person is unable to resolve rated order delivery or performance conflicts under this section, the person should promptly seek special priorities assistance as provided in subpart E of this part. 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 provided in subpart E of this part. For any rated order against which delivery or performance will be delayed, the person must notify the customer as provided in §333.13(d)(3).

(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 §333.17(b).

**§333.15 Extension of priority ratings.**

(a) A person must use rated orders with suppliers to obtain items 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 FEMA.

(b) The priority rating must be included on each successive order placed to obtain items needed to fill a customer's rated order. Therefore, the inclusion of the rating will continue from contractor to subcontractor to supplier throughout the entire supply chain.

(c) A person must use rated orders with suppliers to obtain items needed to fill an emergency preparedness rated order. That person must require acceptance or rejection, and transmission of that acceptance or rejection by the supplier within the time limit stated in the rated order that is being filled.

**§333.16 Changes or cancellations of priority ratings and rated orders.**

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

(1) An official action of FEMA; or

(2) Written electronic notification from the person who placed the rated order (including a Delegate Agency).

(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 shall constitute 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 §333.13.

(d) The following amendments do not constitute a new rated order: a change in shipping destination; a reduction in the total amount of the order; an increase in the total amount of the order which has negligible impact upon deliveries; a minor variation in

size or design (prior to the start of production); or a change which is agreed upon between the supplier and the customer.

(e) A person must cancel any rated orders that the person (or a predecessor in interest) has placed with suppliers or cancel the priority ratings on those orders if the person no longer needs the items in those orders to fill a rated order.

(f) A person adding a rating to an unrated order, or changing or cancelling a priority rating must promptly provide written electronic notification to all suppliers to whom the order was sent of the addition, change, or cancellation.

**§333.17 Use of rated orders.**

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

(1) Items which 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 symbol and the program identification symbol indicated on the customer's rated order must be used on the order. A DX rating symbol may 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.

(c) A person may combine DX and DO rated orders from one customer or several customers if the items covered by each level of priority are identified separately and clearly.

(d) *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 elements of a rated order, as required by §333.12, are included on the order with the statement required in §333.12(d) modified to read in substance: “This purchase order contains rated order quantities certified for national defense use, and you are required to follow all the provisions of the Emergency Management Priorities and Allocations System regulations (44 CFR part 333) as it pertains to the rated quantities.”

(2) A supplier must accept or reject the rated portion of the purchase order as provided in §333.13 and give preferential treatment only to the rated quantities as required by this part. This part may not be used to give preferential treatment to 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 under §333.70.

(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) of this section, if possible, to obtain minimum procurable quantities.

(f) A person is not required to place a priority rating on an order for less than 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, provided that delivery can be obtained in a timely fashion without the use of the priority rating.

### **§333.18 Limitations on placing rated orders.**

(a) *General limitations on placing rated orders.* A person may not place a DO or DX rated order pursuant to this part unless the person is in receipt of a rated order, has been explicitly authorized to do so by FEMA or a Delegate Agency or is otherwise permitted to do so by this part.

(b) *Specific limitations on placing rated orders.* Rated orders may not be used to obtain:

(1) Delivery on a date earlier than needed;

(2) A greater quantity of the item than needed, except to obtain a minimum procurable quantity. Separate rated orders may not be placed solely for the purpose of obtaining minimum procurable quantities on each order if the minimum procurable quantity would be sufficient to cover more than one rated order;

(3) Items in advance of the receipt of a rated order, except as specifically authorized by FEMA (see §333.21(c) for information on obtaining authorization for a priority rating in advance of a rated order); or



(4) Any of the following items unless specific priority rating authority has been obtained from FEMA, a Delegate Agency, or the Department of Commerce:

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

(ii) Production or construction equipment or items to be used for the manufacture of production equipment (for information on requesting priority rating authority, see §333.21).

(5) 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.

**§333.19 Special provisions applicable to rated orders for third parties.**

(a) The provisions of this part apply to rated orders placed by FEMA or a Delegate Agency to facilitate sales to third parties, regardless of the nature of their relationship to the Federal Government, unless otherwise specified.

(b) Where FEMA or a Delegate Agency has placed a rated order to facilitate a sale to a third party, the third party is responsible for satisfying the applicable terms of sale and payment. The Federal Government shall not be liable for any failure to meet the terms of sale or payment.

(c) If a third party is unable to satisfy the applicable terms of sale or payment, FEMA or the Delegate Agency may amend or cancel the rated order pursuant to §333.16 of this part. If FEMA or the Delegate Agency amend the rated order to provide that delivery

shall be made to FEMA, the Delegate Agency, or another third party instead of the original third party, and the amendment shall not constitute a new rated order.

### **Subpart E—Special Priorities Assistance**

#### **§333.20 General provisions.**

(a) EMPAS is designed to be largely self-executing. However, if production or delivery problems arise, a person should immediately contact FEMA (or the Delegate Agency, as appropriate) for special priorities assistance pursuant to §§ 333.20 through 333.24 and as directed by § 333.83. If FEMA (or the Delegate Agency, as appropriate) is unable to resolve the problem or to authorize the use of a priority rating and believes additional assistance is warranted, FEMA (or the Delegate Agency, as appropriate) 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 can be provided for any reason consistent with this part, such as assisting in obtaining timely deliveries of items needed to satisfy rated orders or authorizing the use of priority ratings on orders to obtain items not otherwise ratable under this part. 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 may be submitted on FEMA Form 009-0-142 (OMB control number 1660-NW122) to FEMA. Form 009-0-142 may be obtained from the Delegate Agency or from FEMA.

#### **§333.21 Requests for priority rating authority.**

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

(b) *Rating authority for production or construction equipment.* (1) A request for priority rating authority for production or construction equipment, if needed, must be submitted to the U.S. Department of Commerce on Form BIS-999.

(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) *Rating authority in advance of a rated prime contract.* (1) In certain cases, and upon specific request, FEMA, 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 FEMA or the appropriate Delegate Agency. The person shall also assume any business risk associated with the placing of rated orders if these orders have 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 FEMA (or a Delegate Agency) and our use of that priority rating with our suppliers in no

way commits the Delegate Agency, FEMA, or any other Federal Government agency to enter into a contract or order or to expend funds. Further, we understand that the Federal Government shall 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, FEMA 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) FEMA may require periodic reports on the use of the rating authority granted under paragraph (c) of this section.

(5) If a rated prime contract is not issued, the person must promptly notify all suppliers who have received rated orders pursuant to the advance rating authority that the priority rating on those orders is cancelled.

#### **§333.22 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 where:

(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 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.

#### **§333.23 Criteria for assistance.**

Requests for special priorities assistance should be timely, *i.e.*, the request must be submitted promptly and in enough time for FEMA or the Delegate Agency to effect a meaningful resolution to the problem, and must establish that:

(a) There is an urgent need for the item; and

(b) The applicant has made a reasonable effort to resolve the problem.

#### **§333.24 Instances where assistance will not be provided.**

Special priorities assistance is provided at the discretion of FEMA or the Delegate Agency when it is determined that such assistance is warranted to meet the objectives of this part. Examples where assistance may not be provided include situations when a person is attempting to:

(a) Secure a price advantage;

(b) Obtain delivery prior to the time required to fill a rated order;

(c) Gain competitive advantage;

(d) Disrupt an industry apportionment program in a manner designed to provide a person with an unwarranted share of scarce items; or

(e) Overcome a supplier's regularly established terms of sale or conditions of doing business.

## **Subpart F—Allocation Actions**

### **§333.30 Policy.**

(a) Allocation orders will:

(1) Be used only when there is insufficient supply of a material, service, or facility to satisfy national defense 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.

(c) When a hazard has occurred or is imminent, an allocation order may be used without regard to paragraphs (a) and (b) of this section whenever it is deemed by the Administrator to be necessary or appropriate to promote the national defense.

### **§333.31 General procedures.**

Before FEMA uses its allocations authority to address a supply problem within its resource jurisdiction, it will develop a plan that includes:

(a) A copy of the written determination that the program or programs that would be supported by the allocation action are necessary or appropriate to promote the national defense;

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

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

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

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

(f) 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 (e.g., anticipated start and end dates);

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

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

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

No allocation action by FEMA may be used to control the general distribution of a material in the civilian market unless the President, the Administrator, or another official with lawful authority under section 101(b) of the Act has made a written finding that:

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

(b) 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.

### **§333.33 Types of allocation orders.**

There are three types of allocation orders available for communicating allocation actions.

(a) *Set-aside*. A set-aside is an official action that requires a person to reserve materials, services, or facilities capacity in anticipation of the receipt of rated orders.

(b) *Directive*. A directive is an official action that requires a person to take or refrain from taking certain actions in accordance with its provisions. For example, a directive can require a person to: stop or reduce production of an item; prohibit the use of selected materials, services, or facilities; or divert the use of materials, services, or facilities from one purpose to another.

(c) *Allotment*. An allotment is an official action that specifies the maximum quantity of a material, service, or facility authorized for a specific use to promote the national defense.

### **§333.34 Elements of an allocation order.**

Allocation orders may be issued directly to the affected persons or by constructive notice through publication in the *Federal Register*. This section describes the elements that each order must include.

(a) *Elements to be included in all allocation orders.*



(1) A detailed description of the required allocation action(s), including its relationship to previously or subsequently received DX rated orders, DO rated orders, and unrated orders.

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

(b) *Elements to be included in orders issued directly to affected persons.*

(1) A statement that reads in substance: “This is an allocation order certified for national defense use. [Insert the name of the person receiving the order] is required to comply with this order, in accordance with the provisions of the Emergency Management Priorities and Allocations System regulations (44 CFR part 333), which is part of the Federal Priorities and Allocations System.”

(2) The written signature on a manually placed order, or the digital signature or name on an electronically placed order, of the FEMA Administrator.

(c) *Elements to be included in an allocation order that gives constructive notice through publication in the Federal Register.* (1) A statement that reads in substance: “This is an allocation order certified for national defense use. [Insert the name(s) of the person(s) to whom the order applies or a description of the class of persons to whom the order applies] is (are) required to comply with this order, in accordance with the provisions of the Emergency Management Priorities and Allocations System regulations (44 CFR part 333), which is part of the Federal Priorities and Allocations System.”

(2) The order must be signed by the FEMA Administrator.

### **§333.35 Mandatory acceptance of an allocation order.**

(a) Except as otherwise specified in this section, a person must accept and comply with every allocation order received.

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

(c) If a person is unable to comply fully with the required action(s) specified in an allocation order, the person must notify FEMA immediately, explain the extent to which compliance is possible, and give the reasons why full compliance is not possible. If notification is given verbally, written, electronic confirmation must be provided within 24 hours. Such notification does not release the person from complying with the order to the fullest extent possible, until the person is notified by FEMA that the order has been changed or cancelled.

#### **§333.36 Changes or cancellations of allocation orders.**

An allocation order may be changed or cancelled by an official action from FEMA. Notice of such changes or cancellations may be provided directly to persons to whom the order being cancelled or modified applies or constructive notice may be provided by publication in the *Federal Register*.

#### **Subpart G [Reserved]**

#### **Subpart H—Official Actions**

#### **§333.50 General provisions.**

(a) FEMA may, from time-to-time, take specific official actions to implement or enforce the provisions of this part.

(b) Some of these official actions (rating authorizations and letters and memoranda of understanding) are discussed in this subpart. Official actions that pertain to compliance (administrative subpoenas, demands for information, and inspection authorizations) are discussed in §333.61(c). Directives are discussed in §333.52.

**§333.51 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 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 §333.21.

**§333.52 Directives.**

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

(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.

**§333.53 Letters and memoranda of understanding.**

(a) A letter or memorandum of understanding is an official action, which may be issued electronically, to resolve special priorities assistance cases to reflect an agreement reached by all parties (FEMA, the Department of Commerce (if applicable), a Delegate Agency (if applicable), the supplier, and the customer).

(b) A letter or memorandum 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 or memoranda of understanding are used to confirm production or shipping schedules which do not require modifications to other rated orders.

**Subpart I—Compliance**

**§333.60 General provisions.**

(a) Compliance actions may be taken for any reason necessary or appropriate to the enforcement or the administration of the Defense Production Act and related statutes, this part, or an official action. Compliance actions include audits, investigations, or other inquiries and FEMA may utilize other official actions, such as administrative subpoenas, demands for information, and inspection authorizations as part of the compliance actions under this part.

(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 any 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 FEMA, is a criminal act, punishable as provided in the Defense Production Act and other applicable statutes, and as set forth in §333.64 of this part.

**§333.61 Audits and investigations.**

(a) Audits and investigations are official actions involving the examination 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, FEMA must:

(1) Define the scope and purpose in the official action given to the person under investigation, and

(2) 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, FEMA may issue the following documents, which constitute official actions:

(1) *Administrative subpoenas.* An administrative subpoena requires a person to appear as a witness before an official designated by FEMA 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) *Demand for information.* A demand for information requires a person to furnish to a duly authorized representative of FEMA 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 FEMA 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 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 FEMA 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 FEMA as to the content of the material.

(e) An administrative subpoena, demand for information, or inspection authorization must include the name, title, or official position of the person to be served, the evidence sought to be adduced, 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 them with particularity.

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

(1) Service of a demand for information or inspection authorization must be made personally, or by certified mail—return receipt requested at the person’s last known address. Service of an administrative subpoena must be made personally. Personal service may also be made by leaving a copy of the document with someone at least 18 years of age at the person's last known dwelling or place of business. When a hazard has occurred or is imminent, service of a demand for information or inspection authorization may additionally be made by written electronic communication.

(2) 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 must be mailed to the person named in the document.

(3) Any individual 18 years of age or older may serve an administrative subpoena, demand for information, or inspection authorization. When personal service is made, the individual making the service shall prepare an affidavit as to 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 must be stated on the original document.

### **§333.62 Compulsory process.**

(a) If a person refuses to permit a duly authorized representative of FEMA to have access to any premises or source of information necessary to the administration or

enforcement of the Defense Production Act and other applicable statutes, this part, or official actions, FEMA may seek compulsory process. Compulsory process means 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 the Administrator, in consultation with the FEMA Chief Counsel, there is reason to believe that a person will refuse to permit an audit, investigation, or other inquiry, or that other circumstances exist which make such process desirable or necessary.

#### **§333.63 Notification of failure to comply.**

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

(b) In cases where FEMA determines that a person, either willingly or inadvertently, has failed to comply with the provisions of the Defense Production Act and other applicable statutes, this part, or an official action, 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.

#### **§333.64 Violations, penalties, and remedies.**

(a) Willful violation of the provisions of Title I or Sections 705 or 707 of the Defense Production Act, 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 one year 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 and other applicable statutes, 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 (see section 705 of the Defense Production Act; see also, for example, sections 2 and 371 of Title 18 United States Code):

(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 shall 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 FEMA that, in accordance with this section, delivery has not been made.

### **§333.65 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, this part, or an official action, the person must immediately notify FEMA for resolution of the conflict.

## **Subpart J—Adjustments, Exceptions, and Appeals**

### **§333.70 Adjustments or exceptions.**

(a) A person may submit a request to FEMA 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 consequence of following a provision of this part or an official action is contrary to the intent of the Defense Production Act, 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 shall not relieve any person from the obligation of complying with the provisions of this part or official action in question while the request is being considered unless such interim relief is granted in writing by FEMA.

(d) A decision of FEMA under this section may be appealed to the Administrator.  
(For information on the appeal procedure, see §333.71.)

**§333.71 Appeals.**

(a) Any person who has had a request for adjustment or exception denied by FEMA under §333.70 may appeal to the Administrator, who shall review and reconsider the denial. Such appeals should be submitted to the Office of Policy and Programs at *FEMA-DPA@fema.dhs.gov*, Ref: EMPAS Appeals.

(b)(1) Appeals of denied requests for exceptions from or adjustments to compliance with the provisions of this part or an official action must be received by FEMA no later than 45 days after receipt of a written notice of denial from FEMA. After this 45-day period, an appeal may be accepted at the discretion of the Administrator.

(2) For requests for adjustment or exception involving rated orders placed for the purpose of emergency preparedness in response to a hazard that has occurred or is imminent, an appeal must be received by FEMA no later than 15 days after receipt of a written notice of denial.

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

(d) 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 Administrator.

(e) When a hearing is granted, the Administrator may designate an employee of FEMA to conduct the hearing and to prepare a report. The hearing officer shall determine all procedural questions and impose such time or other limitations deemed

reasonable. In the event that the hearing officer decides that a printed transcript is necessary, all expenses shall be borne by the appellant.

(f) When determining an appeal, the Administrator may consider all information submitted during the appeal as well as any recommendations, reports, or other relevant information and documents available to FEMA, or consult with any other persons or groups.

(g) The submission of an appeal under this section shall not relieve any person from the obligation of complying with the provisions of this part or official action in question while the appeal is being considered, unless such relief is granted in writing by the Administrator.

(h) The decision of the Administrator shall be made within a reasonable time after receipt of the appeal and shall be the final administrative action. It shall be issued to the appellant in writing with a statement of the reasons for the decision.

#### **Subpart K—Miscellaneous Provisions**

##### **§333.80 Protection against claims.**

A person shall 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, notwithstanding that such provision or action shall subsequently be declared invalid by judicial or other competent authority.

##### **§333.81 Records and reports.**

(a) Persons are required to make and preserve for at least three 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 FEMA as provided in §333.61.

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

(e) Under section 705(d) of the Act and the ultimate delegation of that authority to the FEMA Administrator, information obtained under section 705 of the Act which the Administrator deems confidential, or with reference to which a request for confidential treatment is made by the person furnishing such information, shall not be published or disclosed unless the Administrator determines that the withholding of this information is contrary to the interest of the national defense. Information required to be submitted to FEMA in connection with the enforcement or administration of the Act, this part, or an official action, is deemed to be confidential under section 705(d) of the Act and shall not be published or disclosed except as required by applicable Federal law.

**§333.82 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 shall not be construed to affect any administrative actions taken by FEMA, or any outstanding contracts or orders placed pursuant to any of the regulations, orders, schedules, or delegations of authority issued by FEMA prior to [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Such actions, contracts, or orders shall continue in full force and effect under this part unless modified or terminated by proper authority.

**§333.83 Communications.**

General communications concerning this part, including how to obtain copies of this part and explanatory information, requests for guidance or clarification, may be addressed to FEMA's Office of Policy and Program Analysis at *FEMA-DPA@fema.dhs.gov*.

**§333.84 Severability.**

FEMA intends the various provisions of this part to be severable from each other to the extent practicable, such that if a court of competent jurisdiction were to vacate or enjoin any one provision, the other provisions are intended to remain in effect unless they are dependent upon the vacated or enjoined provision.

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**Pete Gaynor,**

*Administrator,*

*Federal Emergency Management Agency.*

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