



# FY 2008 Statutory Checklists

## An Additional Help for ADS Chapter 202

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# FY 2008 Statutory Checklists

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## **I. INTRODUCTION**

The following checklists are intended to be convenient references when planning and implementing assistance programs. The checklists do not have every country prohibition or restriction. Consult the attorneys assigned to your Bureau or Mission to determine if there are additional country-specific or activity-specific prohibitions and "notwithstanding" authorities.

Please see ADS 201.3.3.4 to determine when a checklist should be prepared. In doing a checklist you make a reasonable inquiry, determine the applicability of each statutory reference, and set forth any additional comments or issues (for example, "We are not aware of any information that requires action under this section" or "To the best of our knowledge, we are not aware of any violations under this provision" or "Not applicable because no FY08 ESF funds will be programmed to assist the government of X"). Please contact the listed point of contact only with specific questions regarding the applicability of a particular checklist item.

### **• Country Checklist**

The Country Checklist includes the important provisions of general application from the Foreign Assistance Act of 1961, as amended (FAA), and the FY 2008 Department of State, Foreign Operations, and Related Programs Appropriations Act, (FY 2008 Act), Pub. L. 110-161, December 26, 2007. Please note that the Country Checklist does not list every statutory or regulatory provision applicable to a particular country.

### **• Activity Checklist**

The Activity Checklist has the activity-specific provisions of the FAA, and the FY 2008 Act.

- **Notwithstanding Authorities**

There are various "notwithstanding" authorities that USAID might use to provide assistance when it would otherwise be prohibited. Some examples follow:

1. Disaster Assistance (FAA Sec. 491).
2. Health and Disease Prevention (FAA 104(c)(4) and Child Survival and HIV/AIDS (FY 2008 Act, Sec. 622).
3. Global Health and Child Survival assistance to combat avian influenza by enhancing the preparedness of militaries in Asia and Africa to respond to an avian influenza pandemic (FY 2008 Act, Global Health & Child Survival Account).
4. Assistance for Eastern Europe and the Baltic States (Title II of the FY 2008 Act).
5. Assistance to the Independent States (FAA Sec. 498B(j)).
6. Afghanistan (only for loan defaults under section 612 of the FY 2008 Act or any similar provision of law (i.e., Section 620q of the FAA) and Section 660 of the FAA); Iraq, Lebanon; Montenegro; Pakistan; victims of war; displaced children; displaced Burmese; victims of trafficking in persons and combating trafficking; and, except for Sections 116, 502B and 620A of the FAA, tropical forestry, biodiversity conservation and energy programs aimed at reducing greenhouse gas emissions (FY 2008 Act, Sec. 634).
7. Non-governmental organizations and PL 480 (FY 2008 Act, Sec. 636).
8. Title II Emergency Programs (PL 480 Sec. 202(a)).
9. Assistance from all accounts for the promotion of democracy (programs that support good governance, human rights, independent media, and the rule of law, and otherwise strengthen the capacity of democratic political parties, governments, nongovernmental organizations and institutions, and citizens to support the development of democratic states, institutions, and practices that are responsive and accountable to citizens) (FY 2008 Act, Democracy Fund).
10. ESF assistance for programs and activities for the Central Highlands of Vietnam (FY 2008 Act, ESF Account).
11. ESF for energy-related assistance for North Korea (up to \$53 million) (FY 2008 Act, ESF Account).

## II. COUNTRY CHECKLIST

Part A of the Country Checklist has the general provisions to be completed for a country.

Part B has the “taking into consideration” provisions. They are considered by the Administrator in the annual “Taking into Consideration” Memorandum as part of the Operational Year Budget (OYB) process for all countries, not just those in the OYB. Because they have already been taken into account as part of the budget process, you do not have to include them in doing the checklist.

### PART A. GENERAL PROVISIONS

1. **NARCOTICS CERTIFICATION.** (Section 706(1) of the Foreign Relations Authorization Act, Fiscal Year 2003 (Public Law 107-228) (FRAA), September 30, 2002). As a result of Presidential Determination No. 2007-33 of September 14, 2007 (see <http://www.state.gov/p/inl/rls/prsr/ps/92155.htm>), the narcotics certification applies only to Burma and Venezuela. Afghanistan, The Bahamas, Bolivia, Brazil, Burma, Colombia, Dominican Republic, Ecuador, Guatemala, Haiti, India, Jamaica, Laos, Mexico, Nigeria, Pakistan, Panama, Paraguay, Peru, and Venezuela were identified as “major drug transit or major illicit drug producing” countries. Only Burma and Venezuela were determined to “have failed demonstrably during the previous 12 months to adhere to their obligations under international counternarcotics agreements and take the measures set forth in 489(a)(1) of the FAA.” The President also determined that support for programs to aid Venezuela’s democratic institutions is vital to the national interests of the United States. Accordingly, assistance to Venezuela to support the described programs will not be withheld.

<b>Is this restriction applicable? Please comment.</b>
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2. **INDEBTEDNESS TO U.S. CITIZENS.** (FAA Sec. 620(c)). Absent a Presidential determination based on national security needs, assistance to a government is prohibited if the government is indebted to any U.S. citizen or person for goods or services furnished or ordered, and (a) such citizen or person has exhausted available legal remedies, (b) the debt is not denied or contested, or (c) the indebtedness arises under an unconditional guaranty of payment given by such government (or controlled entity).

[Contact: State counterpart desk officer]

<b>Is this restriction applicable? Please comment.</b>
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3. **SEIZURE OF U.S. PROPERTY.** (Section 527 of the Foreign Relations Authorization Act, 1994-95, which superseded FAA Sec. 620(e)). Absent a waiver by the Department of State, assistance to a government is prohibited if that government has expropriated or seized ownership or control of property at least 50 percent beneficially owned by U.S. citizens without:

- (a) Returning the property to the owner;
- (b) Compensating the owner for the property;
- (c) Offering a domestic procedure providing prompt, adequate, and effective compensation for the property; or
- (d) Submitting the dispute to international arbitration.

As of January 2008 the only country identified is Nicaragua, which has received a waiver until July 29, 2008.

[Contact: State/EB/IFD/OIA, Heather Goethert, 202-647-8988]

<p><b>Is this restriction applicable? Please comment.</b></p>
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4. **SPECIFIC COUNTRIES.** (FAA Secs. 620(a) and 620(f); FY 2008 Act Sec. 607). Assistance is specifically prohibited in the FY 2008 Act to Cuba, Iran, North Korea, and Syria.

<p><b>Is this restriction applicable? Please comment.</b></p>
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5. **LOAN DEFAULT.** (FAA Sec. 620(q); FY 2008 Act Sec. 612 [Brooke Amendment]; see ADS 623). Absent a Presidential waiver, assistance is prohibited to the country under section 620(q) and only to the government of the country under section 512 where:

- (a) The government of the recipient country has been in default for more than six months on interest or principal of any loan by the U.S. to such country under the FAA; or
- (b) The country has been in default for more than one calendar year on interest or principal on any U.S. foreign assistance loan.

The 620q report can be found on the USAID intranet at <http://inside.usaid.gov/M/CFO>.

[Contact: M/FM/LM, Earl Floyd, 202-712-4796.]

**Is this restriction applicable? Please comment.**

6. **DIPLOMATIC RELATIONS WITH U.S.** (FAA Sec. 620(t)). Assistance is prohibited if diplomatic relations between the U.S. and the recipient country are currently severed.

**Is this restriction applicable? Please comment.**

7. **INTERNATIONAL TERRORISM.** (FY 2008 Act Sec. 626; FAA Secs. 620A, 620G).

Assistance is prohibited to a recipient country if the Secretary of State has determined that the government of that country has repeatedly provided support for international terrorism (section 620A). Cuba, Iran, North Korea, Sudan, and Syria have been determined to be countries whose governments have repeatedly provided support for acts of international terrorism.

Assistance is prohibited to a recipient government of a country if that government has provided assistance to a country that has repeatedly provided support for international terrorism (section 620G).

Assistance is prohibited to a recipient country if the President has determined it has granted sanctuary from prosecution to any individual or group which has committed an act of international terrorism or otherwise supports international terrorism (section 626).

The President has authority to waive sections 620A and 626 for national security interests or (subject to certain exceptions) humanitarian reasons and to waive section 620G for assistance in the national interest.

[Contact: State/L/LEI, Andrew Keller, 202-647-7324.]

**Is this restriction applicable? Please comment.**

8. **EXPORT OF LETHAL MILITARY EQUIPMENT TO TERRORIST STATES.** (FY 2008 Act Sec. 642; FAA Sec. 620H). Absent a waiver by the Deputy Secretary of State on national interest grounds, assistance is prohibited to a government that provides lethal military equipment to a government designated by the Secretary of State as a State Sponsor of Terrorism (those described in 7 above).

[Contact: State/L/NPV, CarrieLyn Guymon, 202-647-1102]

**Is this restriction applicable? Please comment.**

9. **DISCRIMINATION.** (FAA Sec. 666(b)). Assistance is prohibited to a recipient country that objects, on the basis of race, religion, national origin, or sex, to the presence of any officer or employee of the U.S. who is present in such country to carry out economic development programs under the FAA.

**Is this restriction applicable? Please comment.**

10. **NUCLEAR TECHNOLOGY.** (Arms Export Control Act Secs. 101, 102).
- (a) Absent special certification by the President, assistance is prohibited if the recipient country has either delivered or received from any other country nuclear enrichment or reprocessing equipment, materials, or technology, without specified arrangements or safeguards any time after August 3, 1977.
  - (b) Absent special certification by the President, assistance is prohibited if the recipient country has, on or after June 30, 1994:
    - (1) Transferred a nuclear explosive device or components or design information for such a device to a non-nuclear weapon state,
    - (2) Detonated a nuclear explosive device (if the country is a non-nuclear weapon state),
    - (3) Received a nuclear explosive device or components or design information for such a device (if the country is a non-nuclear weapon state),
    - (4) Terminated, abrogated or materially violated a full-scope safeguards agreement with the IAEA or materially violated an agreement for nuclear cooperation with the U.S. (if the country is a non-nuclear weapon state), or

- (5) Exported (or attempted to export) illegally from the U.S. any material, equipment, or technology that would contribute significantly to the ability of a country to manufacture a nuclear explosive device.

[Contact: State/L/NPV, Newell Highsmith, 202-647-4621]

**Are these restrictions applicable? Please comment.**

- 11. **MILITARY COUP OR DECREE.** (FY 2008 Act Sec. 608). Assistance is prohibited to the government of a country where the duly elected head of government of the recipient country has been deposed by military coup or decree unless the President has notified Congress that a democratically elected government has since taken office. Since FY 2002, the section does not apply to assistance to promote democratic elections or public participation in democratic processes.

**Is this restriction applicable? Please comment.**

- 12. **EXPLOITATION OF CHILDREN.** (FAA Sec. 116(b)). Assistance is prohibited where the Department of State has determined that the recipient government has failed to take appropriate and adequate measures, within its means, to protect children from exploitation, abuse, or forced conscription into military or paramilitary services.

**Is this restriction applicable? Please comment.**

- 13. **PARKING FINES AND REAL PROPERTY TAXES.** (FY 2008 Act Sec. 643). Assistance to a recipient country must be reduced by 110 percent of the amount of unpaid parking fines and property taxes owed to the District of Columbia and New York City.

OYB country levels are adjusted by amounts owed by F, as part of the OYB process. **No action required** by country desk.

[Contact: Check with Bureau budget office]

- 14. **DELIVERY OF HUMANITARIAN ASSISTANCE.** (FAA Sec. 620I). Absent a Presidential determination, assistance is prohibited where the recipient government has prohibited or otherwise restricted, directly or indirectly, the transport or delivery of U.S humanitarian assistance.



**Is this restriction applicable? Please comment.**

**15. ASSISTANCE TO CUBA.** (FAA Sec. 620(y), as amended by section 2810 of FY 98/99 Foreign Relations Authorization Act, Pub. L. 105-277; LIBERTAD Act Sec. 111; Pub. L. 104-114).

- (a) If a country (or any entity in the country) provided (1) nuclear fuel and related assistance and credits or (2) assistance or credits in support of the Cuban nuclear facility at Juragua, Cuba at any time after March 12, 1996, then assistance to such country must be reduced by an amount equal to the sum of any such assistance or credits.
- (b) Assistance to a recipient country must be reduced by an amount equal to the aggregate value of nuclear fuel related assistance and credits provided by that country to Cuba during the preceding fiscal year, unless Cuba:
  - (1) Has ratified the Treaty on the Non-Nuclear Proliferation of Nuclear Weapons or the Treaty of Tlatelolco and Cuba is in compliance therewith;
  - (2) Has negotiated and is in compliance with full-scope safeguards of the International Atomic Energy Agency not later than two years after ratification by Cuba of such treaty; and
  - (3) Incorporates and is in compliance with internationally accepted nuclear safety standards.

**Are these restrictions applicable? Please comment.**

**16. HUMAN RIGHTS VIOLATIONS.** (FAA Secs. 116 and 502B). If the Department of State has determined that the recipient government has engaged in a consistent pattern of gross violations of internationally recognized human rights, then:

- (a) Economic Support Fund funds may be used only if the assistance will directly benefit the needy; and
- (b) Development Assistance funds may be used only if the President has found that the country has made such significant improvement in its human rights record that furnishing such assistance is in the U.S. national interest.

[Contact: State/L/HRR, Kevin Baumert, 202-647-2773]

**Is this restriction applicable? Please comment.**

17. **TRAFFICKING IN PERSONS (TIP)**. (22 USC 7107). Is the country (Algeria, Equatorial Guinea, North Korea, Sudan, Bahrain, Iran, Oman, Syria, Burma, Kuwait, Qatar, Uzbekistan, Cuba, Malaysia, Saudi Arabia, Venezuela) listed on Tier III of the annual TIP report released each June by the State Department subject to sanctions under the Presidential Determination? The Presidential Determination issued in and around September of each year describes: (a) which countries were reevaluated as being Tier II and therefore not subject to sanctions; (b) which countries that remained on Tier III were subject to sanctions; and (c) which countries remaining on Tier III were the subject of full or partial waivers. The Presidential Determination in effect for FY 2008 is No. 2008-4 and is available at <http://www.state.gov/g/tip/rls/prsrl/07/93704.htm>.

Note: Thirty-two countries have been placed on the Special Watch List for FY 2008 by the State Department. Please refer to <http://www.state.gov/g/tip/rls/tiprpt/2007/82802.htm>. An Interim Assessment will be issued on each of the Special Watch List countries, usually in January of each, and is intended to serve as a mid-term evaluation, giving foreign governments more time to review, respond and avert the prospect of a Tier III ranking and possible sanctions in the pending annual TIP report released each June. Please note that India, as a Tier II Special Watch List country, has been subject to special scrutiny since the issuance of the State Department's 2007 Annual TIP Report, will be reassessed in January 2008 and may be subject to potential re-ranking to Tier 3 at that time.

[Contact: your RLA or AGC; EGAT/WID, Katherine Blakeslee, 202-712-0570.]

**Please comment.**

18. **ESF Assistance for Parties to the International Criminal Court**. (FY 2008 Act Sec. 671 [Nethercutt Amendment]). Economic Support Fund (ESF) assistance is prohibited to provide "assistance to the government of a country" that:
- (a) Is a party to the International Criminal Court (ICC); and
  - (b) Has not entered into an agreement with the U.S. pursuant to Article 98 of the Rome Statute (Article 98 agreement). An Article 98 agreement prevents the ICC from proceeding against U.S. personnel present in that country, and must be "in force" in order to avoid the prohibition.

The President may waive this restriction with regard to any country to which the restriction applies if he determines and reports to the appropriate congressional committees that it is important to the national security interest of the U.S. This

prohibition only applies to ESF funds and its applicability to a country does not make that country ineligible for Millennium Challenge Act (MCA) assistance. Therefore, a country that is ineligible to receive ESF assistance under this provision can still be eligible for MCA assistance.

FY 2005 ESF may be made available for democracy and rule of law programs and activities, notwithstanding the provisions of the FY 2005 Nethercutt amendment (section 547 of division D of PL 108-477).

The list of countries that are restricted under this provision changes over time depending on whether a particular country has become a member of the ICC, and whether a country has signed an Art. 98 agreement with the U.S. As of January 23, 2008, the Nethercutt prohibited countries are: Andorra, Argentina, Australia, Austria, Barbados, Belgium, Bolivia\*, Brazil, Bulgaria, Canada, Costa Rica\*, Croatia, Cyprus\*, Denmark, Ecuador\*, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Kenya\*, Republic of Korea, Latvia, Lichtenstein, Lithuania, Luxembourg, Mali\*, Malta, Mexico\*, Namibia\*, Netherlands, New Zealand, Niger\*, Norway, Paraguay\*, Peru\*, Poland, Portugal, Romania, St. Vincent & the Grenadines, Samoa\*, San Marino, Serbia, Slovakia, Slovenia, South Africa\*, Spain, Sweden, Switzerland, Tanzania\*, Trinidad and Tobago, United Kingdom, Uruguay, Venezuela.

Note: \* denotes countries that received a waiver for FY 2006 funds (PD 2007-5, 11/27/06).

As of January 2008 no waiver has been granted for FY 2007 or FY 2008 ESF funds.

[Contact: your RLA or AGC; State/L/LFA Margaret Taylor, 202-647-5394]

**Please comment.**

19. **EXTRADITION OF INDIVIDUALS ACCUSED OF KILLING A LAW ENFORCEMENT OFFICER.** (FY 2008 Act, Sec. 683). Assistance is prohibited to the central government of a country which has that refuses to extradite to the United States any individual indicted for a criminal offense for which the maximum penalty is life imprisonment without the possibility of parole or for killing a law enforcement officer. This restriction applies to central governments with which the United States maintains diplomatic relations and with which the United States has an extradition treaty and the government of that country is in violation of that treaty. The Secretary may waive this restriction, on a case by case basis, if it is important to the national interests of the United States. .

As of January 2008, L/LEI is not aware of refusals by the central government of any country that would trigger the application of this restriction.

[Contact: State/L/LFA, State/L/LFA Margaret Taylor, 202-647-5394]

Please comment.

20. **TRANSPARENCY AND ACCOUNTABILITY.** (FY 2008 Act, Sec. 668) Assistance is prohibited to the central government of a country that fails to make publicly available on an annual basis its national budget. The restriction applies to all funds appropriated under the FY 2008 Act. The restriction contains a national interest waiver that may be exercised by the Secretary of State.

Such a waiver was granted, on a worldwide basis, on January 23, 2008.

[Contact: State/L/LFA Margaret Taylor, 202-647-5394]

Please comment.

21. **ENFORCEMENT OF NONPROLIFERATION TREATIES.** (Section 530 of the Foreign Relations Authorization Act, Fiscal Years 1994 and 1995 (Public Law 103-236) (FRAA), April 30, 1994) Absent a waiver by the President, assistance under the FAA to a "non-nuclear weapon state" is prohibited if that country has been found to have terminated, abrogated, or materially violated an International Atomic Energy Agency full-scope safeguard agreement, or materially violated a bilateral U.S. nuclear cooperation agreement entered into after March 10, 1978. "Non-nuclear weapon state" means any country which is not a nuclear-weapon state, as defined by Article IX(3) of the Treaty on the Non-Proliferation of Nuclear Weapons (July 1, 1968).

[Contact: State/L /NPV, Newell Highsmith, 202-647-4621]

Please comment.

## **PART B. "TAKING INTO CONSIDERATION" PROVISIONS**

Because they have already been taken into account as part of the budget process, you do not have to include them in doing the checklist.

1. **MOB ACTION.** (FAA Sec. 620 (j)). Assistance may be terminated if the recipient country permitted (or failed to take adequate measures to prevent) damage or destruction of U.S. property by mob action.
2. **SEIZURE OF U.S. FISHING VESSELS.** (FAA Sec. 620(o); Fishermen's Protective Act of 1967, as amended, Sec. 5 (22 U.S.C. 1975(b)). Assistance may be denied or offset if the recipient country has seized, or imposed any penalty or sanction against, any U.S. fishing vessel fishing in international waters.
3. **OVERSEAS PRIVATE INVESTMENT CORPORATION (OPIC) INVESTMENT GUARANTY.** (FAA Sec. 620(l)). Assistance may be denied if the recipient country has failed to enter into an investment guaranty agreement with OPIC.
4. **UNITED NATIONS (U.N.) OBLIGATIONS.** (FAA Sec. 620(u)). The payment status of the recipient country's U.N. obligations is to be taken into account when considering assistance levels.
5. **ALGIERS MEETING.** (Section 720 of the International Security and Development Cooperation Act of 1981 (ISDCA of 1981)). The fact that a country attended and otherwise failed to disassociate itself from the communiqué issued at the Meeting of Ministers of Foreign Affairs and Heads of Delegations of the Non-Aligned Countries to the 36th General Assembly of the U.N. on September 25 and 28, 1981, is to be taken into account when considering assistance levels to such country.

### III. ACTIVITY CHECKLIST

This checklist is to help managers and teams ensure that activities are consistent with applicable law. Since different provisions apply at different stages of the process, this Checklist is divided into the following parts: (A) Planning, (B) Congressional Notifications, and (C) Obligating Documents.

In addition to completing this Checklist, managers and teams should check with the Desk Officer to make sure that the Country Checklist has been completed and nothing has occurred since completion of the Country Checklist that would affect USAID's ability to provide assistance.

For the most part, no distinction between Development Assistance and Economic Support Fund funds is made in this Activity Checklist because the FAA provides that, to the maximum extent feasible, ESF assistance should be provided consistent with the policy directions, purposes, and programs of Development Assistance.

#### PART A. PLANNING

1. **African Palm Oil** (FY 2008 Act, Andean Counterdrug Programs Heading). None of the funds appropriated by the FY 2008 Act may be made available for the cultivation or processing of African oil palm, if doing so would contribute to significant loss of native species, disrupt or contaminate natural water sources, reduce local food security, or cause the forced displacement of local people.

Please comment.

2. **ADVERSE ECONOMIC IMPACT UPON THE UNITED STATES.**

- (a) **IMPACT ON U.S. JOBS; RELOCATION; EXPORT ZONES; VIOLATION OF WORKERS' RIGHTS.** (FY 2008 Act Sec. 632; see ADS 225). Assistance may not be provided:

- (1) To a business located in the U.S. for the purpose of inducing that business to relocate outside the U.S. in a manner that would likely reduce the number of U.S. employees of that business;
    - (2) For an activity that contributes to the violation of internationally recognized workers' rights in the recipient country. This is applied commensurate with the level of development of the recipient country and is not to preclude assistance for the informal sector including micro and small-scale enterprise and smallholder agriculture.

Please comment.

- (b) **PRODUCTION OF SURPLUS COMMODITIES.** (FY 2008 Act Sec. 613(a)). Assistance may not be provided to establish or expand production of any commodity for export if the commodity is likely to be in surplus on world markets and substantial injury will be caused to U.S. producers of the same, similar, or competing commodities.

Is this restriction applicable? Please comment.

- 3. **AGRICULTURAL ACTIVITIES (BUMPERS AMENDMENT).** (FY 2008 Act Sec. 613(b), as interpreted by the conference report for the original enactment). No funds may be used for agricultural development activities (specifically, any testing or breeding feasibility study, variety improvement or introduction, consultancy, publication, conference, or training) that would compete with a similar commodity grown or produced in the United States unless the activity:
  - (a) Is designed to increase food security in developing countries and where such activities will not have a significant impact in the export of agricultural commodities of the United States; or
  - (b) Is a research activity intended primarily to benefit American producers.

Is this restriction applicable? Please comment.

- 4. **COMMUNIST ASSISTANCE.** (FAA Sec. 620(h)). Arrangements should be made to ensure that United States foreign aid is not used in a manner which, contrary to the best interests of the United States, promotes or assists the foreign aid projects or activities of any country that is a Communist country for purposes of FAA section 620(f).

Please comment.

- 5. **ENVIRONMENT.**
  - (a) **ENVIRONMENTAL REVIEW.** (FAA Sec. 117; 22 CFR 216 (USAID Regulation 16), see ADS 204). 22 CFR 216 requires an Initial Environmental Examination, unless the proposed assistance falls within certain exceptions and other actions. Cognizant Technical Officers

remain responsible for ensuring compliance with all 22 CFR 216 requirements.

**Please comment.**

- (b) **DEBT-FOR-NATURE EXCHANGE.** (FAA Sec. 463). Assistance that will finance a debt-for-nature exchange must:
- (1) Support protection of the world's oceans and atmosphere, animal and plant species, or parks and reserves; or
  - (2) Promote natural resource management, local conservation programs, conservation training programs, public commitment to conservation, land and ecosystem management, or regenerative approaches in farming, forestry, fishing, and watershed management.

**Is this applicable? Please comment.**

- (c) **TROPICAL FOREST DEGRADATION.** (FAA Sec. 118). Funds may not be used for:
- (1) The procurement or use of logging equipment, unless an environmental assessment indicates that all timber harvesting operations involved will be conducted in an environmentally sound manner and that the proposed activity will produce positive economic benefits and sustainable forest management systems;
  - (2) Actions that will significantly degrade national parks or similar protected areas that contain tropical forests, or introduce exotic plants or animals into such areas;
  - (3) Activities that would result in the conversion of forest lands to the rearing of livestock;
  - (4) The construction, upgrading, or maintenance of roads (including temporary haul roads for logging or other extractive industries) that pass through relatively undegraded forest lands;
  - (5) The colonization of forest lands; or
  - (6) The construction of dams or other water control structures that flood relatively undergraded forest lands.



However, funds may be used for activities in (3) through (6) above if an environmental assessment indicates that the proposed activity will contribute significantly and directly to improving the livelihood of the rural poor and will be conducted in an environmentally sound manner that supports sustainable development.

<b>Is this applicable? Please comment.</b>
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6. **EXPROPRIATION AND LAND REFORM.** (FAA Sec. 620(g)). Assistance may not be used to finance compensation to owners for expropriated or nationalized property, except to compensate foreign nationals in accordance with a land reform program certified by the President.

<b>Is this applicable? Please comment.</b>
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7. **FAMILY PLANNING.**

- (a) **ABORTIONS AND INVOLUNTARY STERILIZATIONS PROHIBITED.\*** (FAA Sec. 104(f); FY 2008 Act, Sec. 618 and "Global Health and Child Survival" heading under Title III). Funds may not be used:

- (1) To pay for the performance of abortions as a method of family planning or to motivate or coerce any person to practice abortions.\*\*
- (2) To pay for the performance of involuntary sterilization as a method of family planning or to coerce or provide any financial incentive to any person to undergo sterilizations.
- (3) To pay for any biomedical research that relates, in whole or in part, to methods of, or the performance of, abortions or involuntary sterilization as a means of family planning.
- (4) To furnish assistance to any country or organization if the President certifies that the use of these funds by such country or organization would violate the three provisions above.
- (5) To lobby for or against abortion.
- (6) To furnish assistance to any organization or program that, as determined by the President of the United States, supports or participates in the management of a program of coercive abortion or involuntary sterilization.

\* Note that the Mexico City Policy, which is executive policy and not statutory, may also be applicable. The Mexico City Policy requires foreign non-governmental organizations to certify that they will not perform or actively promote abortion as a method of family planning as a condition for receiving USAID assistance for family planning. See CIB 01-08(R) for a complete description of the Mexico City Policy.

\*\* For purposes of the FY 2008 Act or any other Act authorizing or appropriating funds for foreign operations, export financing, and related programs, the term "motivate", as it relates to family planning assistance, shall not be construed to prohibit the provision, consistent with local law, of information or counseling about all pregnancy options.

<p><b>Is this applicable? Please comment.</b></p>
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**(b) VOLUNTARY FAMILY PLANNING SUPPORT.** (FY 2008 Act, Title III, under heading "Global Health and Child Survival"). Funds may be made available only to voluntary family planning projects that:

- (1) Offer, either directly or through referral to, or provide information about access to, a broad range of family planning methods and services.
- (2) Meet the following requirements:
  - (a) Service providers or referral agents in the project do not implement or are not subject to quotas, or other numerical targets, of total number of births, number of family planning acceptors, or acceptors of a particular method of family planning (quantitative estimates or indicators for planning and budgeting purposes are acceptable);
  - (b) The project must not provide payment of incentives, bribes, gratuities, or financial rewards to a person for becoming a family planning acceptor or to program personnel for achieving a numerical target or quota of total number of births, number of family planning acceptors, or acceptors of a particular method of family planning;
  - (c) The project must not deny any right or benefit, including right of access to any program of general welfare or right of access to health care, as a consequence of any decision not to accept family planning services;
  - (d) The project must provide comprehensible information of the health benefits and risks of method chosen; and

- (e) The project must ensure that experimental contraceptive drugs and devices and medical procedures are provided only in the context of scientific study in which participants are advised of potential risks and benefits.
- (3) In awarding grants for natural family planning under section 104 of the Foreign Assistance Act of 1961 no applicant may be discriminated against because of such applicant's religious or conscientious commitment to offer only natural family planning.

**Is this applicable? Please comment.**

**8. HIV/AIDS.**

- (a) **MEDICALLY ACCURATE INFORMATION ON CONDOMS.** (FY 2008 Act, "Global Health and Child Survival" heading under Title III). Information provided about the use of condoms as part of projects or activities that are funded from amounts appropriated under the FY 2008 Act shall be medically accurate.\* Such information must be consistent with USAID's fact sheet entitled, "USAID: HIV/STI Prevention and Condoms, which may be accessed at:  
[http://www.usaid.gov/our\\_work/global\\_health/aids/TechAreas/prevention/condomfactsheet.html](http://www.usaid.gov/our_work/global_health/aids/TechAreas/prevention/condomfactsheet.html).

\* Note: An identical requirement has been included in all appropriations acts since FY 2004.

**Is this applicable? Please comment.**

- (b) **CONSCIENCE CLAUSE.** (Section 301(d) of the U.S. Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 (Public Law 108-25) (Leadership Act)). An organization that is otherwise eligible to receive FY 04-FY 08 funds to prevent, treat, or monitor HIV/AIDS shall not be required, as a condition of receiving the assistance, to endorse or utilize a multisectoral (i.e., ABC) approach to combating HIV/AIDS, or to endorse, utilize, or participate in a prevention method or treatment program to which the organization has a religious or moral objection.

**Is this applicable? Please comment.**

- (c) **PROSTITUTION AND SEX TRAFFICKING – LIMITATION ON USE OF FUNDS.** (Leadership Act Section 301(e)). FY 04-FY 08 funds for HIV/AIDS activities may not be used to promote or advocate the legalization or practice of prostitution or sex trafficking. This prohibition does not restrict the provision to individuals of palliative care, treatment, or post-exposure pharmaceutical prophylaxis, and necessary pharmaceuticals and commodities, including test kits, condoms, and when proven effective, microbicides.

<b>Is this applicable? Please comment.</b>
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- (d) **PROSTITUTION AND SEX TRAFFICKING – ORGANIZATIONAL ELIGIBILITY.** (Leadership Act Section 301(f); FY 2004 Act, Sec. 595 and Statement of Managers). Any NGO or PIO receiving FY 04-FY 08 funds for HIV/AIDS activities must have a policy explicitly opposing prostitution and sex trafficking.\* The following organizations are statutorily exempt from this requirement: the Global Fund to Fight AIDS, Tuberculosis and Malaria; the World Health Organization (including WHO's six regional offices: The Americas (PAHO), South-East Asia (SEARO), Africa (AFRO), East Mediterranean (EMRO), Europe (EURO), and Western Pacific (WPRO)); the International AIDS Vaccine Initiative; and any "United Nations agency".

\* Note: This requirement is the subject of ongoing litigation. USAID is enjoined from enforcing this requirement against certain organizations. Please contact your cognizant RLA or GC/EGAT&GH if you have any questions regarding application of this requirement.

<b>Is this applicable? Please comment.</b>
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9. **ANTI-TRAFFICKING IN PERSONS.**

- (a) **LIMITATION ON USE OF FUNDS.** (Trafficking Victims Protection Act of 2000, as amended (TVPA), Section 113(g)(1)). No funds made available to carry out the TVPA (i.e., to combat human trafficking), regardless of the year of funding, may be used to promote, support, or advocate the legalization or practice of prostitution. This prohibition does not restrict assistance designed to promote the purposes of the TVPA by ameliorating the suffering of, or health risks to, victims while they are being trafficked or after they are out of the situation that resulted from such victims being trafficked. See AAPD 07-03,\* "Anti-Trafficking

Activities--Limitation on Use of Funds; Restriction on Organizations Promoting, Supporting, or Advocating Prostitution.”

\* Note: AAPD 07-03 replaces AAPD 04-09 and supplements AAPD 04-16.

**Is this applicable (i.e, is the purpose of the activity to combat trafficking in persons)? Please comment.**

**(b) ORGANIZATION RESTRICTION.** (Trafficking Victims Protection Act of 2000, as amended (TVPA), Section 113(g)(2)). No funds made available to carry out the TVPA (i.e., to combat human trafficking), regardless of the year of funding, may be used to implement any program that targets victims of severe forms of trafficking in persons as defined in Section 103(8)(A) of the TVPA through any organization that has not stated in either a grant application, a grant agreement, or both, that it does not promote, support, or advocate the legalization or practice of prostitution. This prohibition does not apply to organizations that provide services to individuals solely after they are no longer engaged in activities that resulted from such victims being trafficked. See AAPD 07-03,\* “Anti-Trafficking Activities--Limitation on Use of Funds; Restriction on Organizations Promoting, Supporting, or Advocating Prostitution.”

\*Note that AAPD 07-03 replaces AAPD 04-09 and supplements AAPD 04-16.

**Is this applicable (i.e., does any part of the activity target victims of severe forms of trafficking)? Please comment.**

- 10. INTERNATIONAL CONFERENCES.** (FY 2008 Act Sec. 640, see Guidance on Funding Foreign Government Delegations to International Conferences, Mandatory Reference to ADS 302, 303, 306, 308, 350, and 522). Development Assistance funds may not be used to pay the costs for participation of another country’s delegation at international conferences held under the auspices of multilateral or international organizations.

**Is this applicable? Please comment.**

11. **LEGISLATIVE ACTION.** (FAA Sec. 611(a)(2)). If the obligation is more than \$500,000 and requires legislative action within the recipient country, there must be a basis for a reasonable expectation that such action will be completed in time to permit orderly accomplishment of the purpose of the assistance.

<p><b>Is this restriction applicable? Please comment.</b></p>
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12. **LOANS.**

(a) (FAA Section 122(b)). In making loans, USAID must consider the following:

- (1) Information and conclusion on the capacity of the country to repay the loan at a reasonable rate of interest.
- (2) Does the activity give reasonable promise of assisting long-range plans and programs designed to develop economic resources and increase productive capacities?
- (3) If repayable in dollars, the interest rate must be at least 2 percent per annum during a grace period which is not to exceed 10 years, and at least 3 percent per annum thereafter, but no higher than the applicable legal rate of interest of the country in which the loan is being made.

<p><b>Is this applicable? Please comment.</b></p>
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(b) **PRODUCTIVE ENTERPRISES COMPETING WITH U.S. ENTERPRISES.** (FAA Sec. 620(d)). No FAA loan funds may be used for any productive enterprise that will compete with U.S. enterprises, unless:

- (1) There is an agreement by the recipient country to prevent export for use or consumption in the U.S. of more than 20 percent of the enterprise's annual production during the life of the loan; or
- (2) If in the absence of such an agreement, the President has established import controls to effectuate that agreement.

This may also be waived by the President due to national security interests.

Is this restriction applicable? Please comment.

- 13. **MILITARY PURPOSES.** (FAA Sec. 531(e)). Congress has explicitly provided that ESF funds may not be used for military or paramilitary purposes (e.g., combat training programs and exercises or support for the military).

Is this restriction applicable? Please comment.

- 14. **POLICE AND PRISONS.** (FAA Sec. 660). Assistance may not be used to provide training, advice, or any financial support for police, prisons, or other law enforcement forces (see exceptions in sections 660, 119 and 534 of the FAA; Section 536 of the FY 2004 Act (permanent provision of law); Sections 634(a) (only with regard to Afghanistan), 634(g) (extends 660(b)(6) to regional activities), 661 (community-based police assistance), and 634(p) (prison conditions) of the FY 2008 Act).

Is this restriction applicable? Please comment.

- 15. **PUBLICITY, PROPAGANDA, AND LOBBYING.** (FY 2008 Act Sec. 639; Anti-Lobbying Act, 18 U.S.C. 1913). Assistance may not be used, intended, or designed to influence a Member of Congress, a jurisdiction or any official of any government in the United States, to favor, adopt, or oppose, by vote or otherwise, any legislation, law, ratification, policy, or appropriation; to influence in any way the outcome of a political election in the United States; or for any publicity or propaganda purposes not authorized by Congress.<sup>1</sup> There are some exceptions to this general rule; please consult your AGC or RLA.

Is this applicable? Please comment.

- 16. **SECURITY FORCES.** (FY 2008 Act Sec. 651 [Leahy amendment], which amends the Foreign Assistance Act to now include FAA Sec. 620J). Assistance may not be provided to any unit of the security forces of a foreign country if the Secretary of State has credible evidence that such unit has committed gross violations of human rights. See State Cable 34981 (January 2003) and the State Department

<sup>1</sup> See also GC Memorandum dated 5/9/97 by Jan Miller discussing OMB Circular A-122 restrictions regarding lobbying and other advocacy activities.

Leahy Amendment compliance guide found at <http://esoccr.irm.state.gov/Leahy/LeahyGuide.htm>. "Security forces" are understood to be members of the law enforcement community or the military. Prison guards, customs police, border police, and tax police would be examples of persons included in the category of "security forces." State Department implementation guidance requires that the Post and Washington vet security force units or individuals prior to the provision of FOAA-funded training or assistance.

**Is this applicable? Please comment.**

17. **HUMANITARIAN ASSISTANCE CODE OF CONDUCT.** (Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005 (P.L. 109-13) Sec. 2110). International Disaster and Famine Assistance, and Transition Initiatives funds may not be obligated directly by USAID in an assistance agreement or an acquisition agreement with any organization that fails to adopt a code of conduct that provides for the protection of beneficiaries of assistance from sexual exploitation and abuse in humanitarian relief operations.

**Is this applicable? Please comment.**

18. **FOREIGN ASSETS CONTROL REGULATIONS.** Is assistance being provided or a payment being made to a national of a country subject to trade and economic sanctions administered by the Office of Foreign Assets Control (OFAC) of the Department of Treasury? See OFAC website: <http://www.ustreas.gov/ofac/>. If so, has a license been issued to USAID by OFAC?

[Contact: GC/DCHA, Gary Winter, 202-712-1548.]

**Is this applicable? Please comment.**

19. **TOBACCO.** (FY 2008 Act Section 699N) Funds made available in the FY 2008 Act may not be used to "promote the sale or export of tobacco or tobacco products, or to seek the reduction or removal by any foreign country of restrictions on the marketing of tobacco or tobacco products, except for restrictions which are not applied equally to all tobacco or tobacco products of the same type."



Is this applicable? Please comment.

- 20. **PRIOR APPROVAL BY HOST GOVERNMENT.** (FY 2008 Act Sec 634(o)). Democracy, human rights, and governance activities of non-governmental organizations shall not be subject to prior approval by the host government.

Is this applicable? Please comment.

**PART B. CONGRESSIONAL NOTIFICATIONS**

1. **GENERAL NOTIFICATION.** (FY 2008 Act Sec. 615; FAA Sec. 634A). Obligations must be notified to Congress. This is traditionally accomplished through the annual Congressional Presentation. At the time of compiling this checklist, discussions with the Hill on notifications under the new framework are ongoing and will likely involve a country report or notification that will provide a second opportunity to notify activities after 653(a) levels have been negotiated with the Hill. Despite an activity being notified in the CBJ and/or post-653(a) country report, it may be the subject of a Special Notification, as below. Additionally, a new Congressional Notification must be made 15 days in advance of the obligation if the amount of the obligation has increased 10 percent from that previously notified.

<p><b>Is this applicable? Please comment.</b></p>
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2. **SPECIAL NOTIFICATION.** For activities, countries, and other actions requiring special notification see the Annex, "Changes Made by the FY 2008 Foreign Operations Appropriations Act to Current Law."

<p><b>Is this applicable? Please comment.</b></p>
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**PART C. OBLIGATING DOCUMENTS**

1. **SOURCE, ORIGIN, AND NATIONALITY.** (See ADS 310).

- (a) **GENERAL.** (FAA Sec. 604(a)). All procurement must be from the U.S., the recipient country or developing countries, except as otherwise determined in accordance with Agency rules, including the DFA Procurement Guidance. If planning procurement elsewhere, a waiver must be obtained.

Please comment.

- (b) **AUTOMOBILES – BUY ONLY U.S. MADE MOTOR VEHICLES.** (FAA Sec. 636(i)). Assistance may not be used to finance the purchase, sale, long-term lease, exchange, or guaranty of the sale of motor vehicles manufactured outside the U.S., unless a waiver is obtained.

Please comment.

- (c) **AGRICULTURAL PROCUREMENT.** (FAA Sec. 604(e)). Agricultural commodities and products thereof must be procured within the U.S. unless the commodity or product could not be reasonably produced in the U.S. in fulfillment of the particular assistance program. Waivers are available in some circumstances.

Please comment.

- (d) **CONSTRUCTION OR ENGINEERING SERVICES.** (FAA Sec. 604(g)). No engineering or construction services may be procured from advanced developing countries<sup>2</sup> eligible under Code 941 that have attained competitive capability in international markets, *unless*:

- (1) The advanced developing country is receiving direct economic assistance under the FAA, and
- (2) Its own assistance program would permit U.S. firms to compete for similar services.

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<sup>2</sup> While GC has not formally defined the term “advanced developing countries,” GC has considered both World Bank and OECD/DAC definitions of that phrase. Any questions should be brought to the relevant regional AGC.

Please comment.

2. **CASH TRANSFERS – REQUIREMENT FOR SEPARATE ACCOUNT.** (FY 2008 Act Sec. 628(b)). If assistance is in the form of a cash transfer or nonproject sector assistance, all such cash payments must be maintained by the country in a separate account and not commingled with any other funds (unless such requirements are waived by Congressional notice for nonproject sector assistance).

Please comment.

3. **CAPITAL ASSISTANCE.**

- (a) **MISSION DIRECTOR CERTIFICATION/ASSISTANT ADMINISTRATOR DETERMINATION.** (FAA Sec. 611(e)). When capital assistance is proposed (for example, construction), and total U.S. assistance for it will exceed \$1 million, the Mission Director must certify and the Regional Assistant Administrator must take into consideration the country's capability to maintain and utilize the assistance effectively.

Please comment.

- (b) **DEVELOPMENTALLY SOUND PROJECTS.** (Jobs Through Export Act of 1992, Sections 303 and 306(b)), Pub. L. 102-549, 22 U.S.C. 2421b and 2421d(b). If assistance is being provided for a capital activity, the activity must be developmentally sound and measurably alleviate the worst manifestations of poverty or directly promote environmental safety and sustainability at the community level.

Please comment.

- (c) **U.S. ENGINEERING SERVICES.** (FAA Sec. 601(d)). If using capital (for example, construction) assistance, U.S. engineering and professional services must be used to the maximum extent, consistent with U.S. interests.

Please comment.

4. **ASSISTANCE GENERATING LOCAL CURRENCY.** (FY 2008 Act Sec. 628(a)). If assistance is furnished to a foreign government under arrangements that result in the generation of local currencies, then:

- (a) USAID must:
  - (1) Require that local currencies be deposited in a separate account established by the recipient government;
  - (2) Enter into an agreement with that government providing the amount of local currencies to be generated and the terms and conditions under which the currencies so deposited may be utilized; and
  - (3) Establish by agreement the responsibilities of USAID and the host government to monitor and account for deposits into and disbursements from the separate account.
- (b) Local currencies, or an equivalent amount of local currencies, can be used only to carry out the purposes of the Development Assistance or Economic Support Fund chapters of the FAA (depending on which chapter is the source of the assistance) or for the administrative requirements of the United States Government.
- (c) USAID should take all necessary steps to ensure that the equivalent of local currencies disbursed from the separate account is used for the agreed purposes.
- (d) If assistance is terminated to a country, unencumbered balances of funds remaining in a separate account should be disposed of for purposes agreed to by the recipient government and the United States Government.

**Please comment.**

5. **ALCOHOLIC BEVERAGES AND CERTAIN ENTERTAINMENT EXPENSES.** (FY 2008 Act Sec. 648). Global Health and Child Survival, Development Assistance, or Economic Support Funds may not be used for alcoholic beverages or entertainment expenses that are substantially of a recreational nature.

**Please comment.**

6. **STATE DEPARTMENT NOTIFICATION OF BILATERAL AGREEMENTS WITH AN OBLIGATION OF \$25 MILLION OR MORE.** (see ADS 349 and Circular 175). The date of signing and the amount involved must be cabled to State's Office of Assistant Legal Adviser for Treaty Affairs (L/T) immediately upon signing and the full text of the agreement should be pouched to State/L/T within 20 days of signing.

Please comment.

7. **ENGINEERING AND FINANCIAL PLANS.** (FAA Sec. 611). Before an obligation of more than \$500,000, there must be:

- (a) Engineering, financial, or other plans necessary to carry out the assistance; and
- (b) A reasonably firm estimate of the cost to the U.S. of the assistance.

And, if the plan relates to a water or water-related land resource construction, the plan should include a computation of benefits and costs. This figure must be computed to the extent practicable in accordance with the principles, standards, and procedures established pursuant to the Water Resources Planning Act (42 U.S.C. 1962, et seq.).

Please comment.

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