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Subpart A—General Provisions

§ 0.735–1 Purpose.

The purpose of this part is to set forth Department of Commerce policy and procedure relating to employee responsibilities and conduct.

§ 0.735–2 Relation to basic provisions.

(a) This part implements the following:

(1) The provisions of law cited in this part;

(2) Executive Order 11222 of May 8, 1965 (3 CFR, 1965 Supp. p. 130);

(3) Part 735 of the Civil Service regulations (5 CFR 735.101–735.412, inclusive).

(b) This part prescribe additional standards of ethical and other conduct and reporting requirements deemed appropriate in the light of the particular functions and activities of this Department.

§ 0.735–3 Applicability.

This part applies to all persons included within the term ''employee'' as defined in § 0.735–4, except as otherwise provided in this part.

§ 0.735–4 Definitions.

For purposes of this part, except as otherwise indicated in this part:

(a) *Employee* (1) Shall include: (i) Every officer and employee of the Department of Commerce (regardless of location), including commissioned officers of the Environmental Science Services Administration; and

(ii) Every other person who is retained, designated, appointed, or employed by a Federal officer or employee, who is engaged in the performance of a function of the Department under authority of law or an Executive act, and who is subject to the supervision of a Federal officer or employee while engaged in the performance of the duties of his position not only as to what he does but also as to how he performs his duties, regardless of whether the relationship to the Department is created by assignment, detail, contract, agreement or otherwise.

(2) Shall not include: (i) Members of the Executive Reserve except when they are serving as employees of the Department under the circumstances described in paragraph (a)(1) of this section;

(ii) Members of crews of vessels owned or chartered to the Government and operated by or for the Maritime Administration under a General Agency Agreement; or

(iii) Any other person who is determined legally not to be an officer or employee of the United States.

(b) *Special Government employee* shall mean an employee as defined in paragraph (a) of this section who is retained, designated, appointed, or employed to perform with or without compensation, for not to exceed 130 days during any period of 365 consecutive days, temporary duties on either a full-time or intermittent basis.

(c) *Personnel officer* means a personnel official to whom the power of appointment is redelegated under Administrative Order 202–250.

(d) *Operating unit* means, for purposes of this part, primary and constituent operating units designated as such in the Department Order Series of the Department of Commerce and, in addition, the Office of the Secretary.

(e) *Head of an operating unit*,for the purposes of this part, includes the Assistant Secretary for Administration with respect to the performance of functions under this part for the Office of the Secretary.

Subpart B—General Policy

§ 0.735–5 General principles.

Apart from statute, there are certain principles of fair dealing which have the force of law and which are applicable to all officers of the Government. A public office is a public trust. No public officer can lawfully engage in business activities which are incompatible with the duties of his office. He cannot, in his private or official character, enter into engagements in which he has, or can have, a conflicting personal interest. He cannot allow his public duties to be neglected by reason of attention to his private affairs. Such conflicts of interest are not tolerated in the case of any private fiduciary, and they are doubly proscribed for a public trustee. (40 Ops. Atty. Gen. 187, 190.)

§ 0.735–6 Standards required in the Federal service.

5 CFR 735.101 states: ''The maintenance of unusually high standards of honesty, integrity, impartiality, and conduct by Government employees and special Government employees is essential to assure the proper performance of the Government business and the maintenance of confidence by citizens in their Government.''

§ 0.735–7 Special requirements of the Department.

The close and sensitive relationship between the Department of Commerce and the Nation's business community calls for special vigilance on the part of all officers and employees to avoid even any appearance of impropriety. The regulations set forth in this part have been adopted in order to promote the efficiency of the service in the light of the particular ethical and administrative problems arising out of the work of the Department.

§ 0.735–8 Limitations on private activities and interests.

It is the policy of the Department to place as few limitations as possible on private activities or interests consistent with the public trust and the effective performance of the official business of the Department. There is no general statutory or regulatory limitation on the conduct of private activities for compensation by officers or employees of the Department, when the private activity is not connected with any interest of the Government. When the private activity does not touch upon some interest, it may be conducted if it falls outside applicable statutory limitations and regulatory limitations.

Subpart C—Statutory Limitations Upon Employee Conduct

§ 0.735–9 Employee responsibilities.

Each employee and special Government employee has a positive duty to acquaint himself with the numerous statutes relating to the ethical and other conduct of employees and special employees of the Department and of the Government Appendix A of this part contains a listing of the more important statutory provisions of general applicability. In case of doubt on any question of statutory application to fact situations that may arise, the employee should consult the text of the statutes, which will be made available to him by his organization unit, and he should also avail himself of the legal counseling provided by this part.

Subpart D—Regulatory Limitations Upon Employee Conduct

§ 0.735–10 Administrative extension of statutory limitations.

The provisions of the statutes identified in this part which relate to the ethical and other conduct of Federal employees are adopted and will be enforced as administrative regulations, violations of which may in appropriate cases be the basis for disciplinary action, including removal. The fact that a statute which may relate to employee conduct is not identified in this part does not mean that it may not be the basis for disciplinary action against an employee.

§ 0.735–10a Proscribed actions.

An employee shall avoid any action, whether or not specifically prohibited by this subpart, which might result in, or create the appearance of:

(a) Using public office for private gain;

(b) Giving preferential treatment to any person;

(c) Impeding Government efficiency or economy;

(d) Losing complete independence or impartiality;

(e) Making a government decision outside official channels; or

(f) Affecting adversely the confidence of the public in the integrity of the Government.

§ 0.735–11 Gifts, entertainment, and favors.

(a) *General limitations.* Except as provided in paragraphs (b) and (f) of this section, an employee shall not solicit or accept, directly or indirectly, any gift, gratuity, favor, entertainment, loan, payment of expenses, fee, compensation, or any other thing of monetary value, for himself or another person, from a person who:

(1) Has, or is seeking to obtain, contractual or other business or financial relations with the Department of Commerce;

(2) Conducts operations or activities that are regulated by the Department of Commerce; or

(3) Has interests that may be substantially affected by the performance or nonperformance of the employee's

official duty or by actions of the Department.

(b) *Exceptions.* The following exceptions are authorized to the limitation in paragraph (a) of this section:

(1) Acceptance of a gift, gratuity, favor, entertainment, loan, payment of expenses, fee, compensation, or other thing of monetary value incident to obvious family or personal relationships (such as those between the employee and the parents, children, or spouse of the employee) when the circumstances make it clear that it is those relationships rather than the business of the persons concerned which are the motivating factors.

(2) Acceptance of food and refreshments of nominal value on infrequent occasions in the ordinary course of a luncheon or dinner meeting or other meeting or on an inspection tour where an employee may properly be in attendance. For the purpose of this section, ''nominal value'' means that the value of the food or refreshments shall not be unreasonably high under the circumstances.

(3) Acceptance of loans from banks or other financial institutions on customary terms and on security not inconsistent with paragraph (a) of this section, to finance proper and usual activities of employees, such as home mortgage loans.

(4) Acceptance of unsolicited advertising or promotional material, such as pens, pencils, note pads, calendars, and other items of nominal intrinsic value.

(5) Acceptance of a gift, gratuity, favor, entertainment, loan, payment of expenses, fee, compensation, or other thing of monetary value when such acceptance is determined by the head of the operating unit concerned to be necessary and appropriate in view of the work of the Department and the duties and responsibilities of the employee. A copy of each such determination shall be sent to the counselor of the Department.

(6) Special Government employees are covered by this section only while employed by the Department or in connection with such employment.

(c) [Reserved]

(d) *Gifts to superiors.* An employee shall not solicit a contribution from another employee for a gift to an official superior, make a donation as a gift to an official superior, or accept a gift from an employee receiving less pay than himself (5 U.S.C. 7351). However, this paragraph does not prohibit a voluntary gift of nominal value or donation in a nominal amount made on a special occasion such as marriage, illness, or retirement. An employee who violates these requirements shall be removed from the service.

(e) *Gifts from a foreign government.* An employee shall not accept a gift, present, decoration, or other thing from a foreign government unless acceptance is (1) authorized by Congress as provided by the Constitution and in Pub. L. 89–673, 80 Stat. 952, and (2) authorized by the Department of Commerce as provided in Administrative Order 202–739.

(f) *Reimbursement for travel expenses and subsistence.* Neither this section nor § 0.735–12 precludes an employee from receipt of bona fide reimbursement, unless prohibited by law, for expenses of travel and such other necessary subsistence as is compatible with this part for which no Government payment or reimbursement is made. However, this paragraph does not allow an employee to be reimbursed, or payment to be made on his behalf, for excessive personal living expenses, gifts, entertainment, or other personal benefits, nor does it allow an employee to be reimbursed by a person for travel on official business under agency orders when reimbursement is proscribed by Decision B–128527 of the Comptroller General dated March 7, 1967. (Requirements applicable to Department of Commerce employees are set forth in Department of Commerce Administrative Order 203–9.)

§ 0.735–12 Outside employment or other activity.

(a) *Incompatible outside employment or other outside activity.* An employee shall not engage in outside employment or other outside activity not compatible (1) with the full and proper discharge of the duties and responsibilities of his Government employment, (2) with the policies or interests of the Department, or (3) with the maintenance of the highest standards of ethical and moral

conduct. Incompatible activities include but are not limited to:

(i) Acceptance of a fee, compensation, gift, payment of expense, or any other thing of monetary value in circumstances in which acceptance may result in, or create the appearance of, a conflict of interest;

(ii) Outside employment which tends to impair the employee's mental or physical capacity to perform his Government duties and responsibilities in an acceptable manner;

(iii) Employment with any foreign government, corporation, partnership, instrumentality, or individual unless authorized by the Department;

(iv) Employment by, or service rendered under contract with, any of the persons listed in § 0.735–11(a);

(v) Receipt by an employee, other than a special Government employee, of any salary or anything of monetary value from a private source as compensation for his services to the Government. (18 U.S.C. 209).

(b) *Improper benefit from official activity.* (1) No employee of the Department shall receive compensation (e.g., an honorarium) or anything of monetary value, other than that to which he is duly entitled from the Government, for the performance of any activity during his service as such employee of the Department and within the scope of his official responsibilities.

(2) As used in this paragraph, ''within the scope of his official responsibilities'' means in the course of or in connection with his official responsibilities. (See 29 Comp. Gen. 163; 30 id. 246; 32 id. 454; 35 id. 354; B–131371, July 17, 1957.)

(3) An activity shall ordinarily be considered to be in the course of or in connection with an employee's official responsibilities if it is performed as a result of an invitation or request which is addressed to the Department or a component thereof, or which is addressed to an employee at his office at the Department, or which there is reason to believe is extended partly because of the official position of the employee concerned. (When in doubt, it may be asked whether it is likely that the invitation would have been received if the recipient were not associated with the Department.) Whether an employee is on leave while performing an activity shall be considered irrelevant in determining whether an activity is performed in the course of or in connection with the employee's official responsibilities.

(4) Acceptance of a gift or bequest on behalf of the Department shall be made in accordance with Department Order 3 and Administrative Order 203–9.

(c) *Teaching, lecturing, and writing.* Employees are encouraged to engage in teaching, lecturing, and writing that is not prohibited by law. Executive Order 11222, 5 CFR Part 735, or the regulations in this part and Administrative Order 201–4, ''Writing for Outside Publication,'' subject to the following conditions:

(1) An employee shall not, either for or without compensation, engage in teaching, lecturing, or writing, including teaching, lecturing, or writing for the purpose of the special preparation of a person or class of persons for an examination of the Office of Personnel Management or the Board of Examiners for the Foreign Service, that depends on information obtained as a result of his Government employment, except when that information has been made available to the general public or will be made available on request, or when the Assistant Secretary for Administration or his designee gives written authorization for the use of nonpublic information on the basis that the use is in the public interest.

(2) No employee shall receive compensation or anything of monetary value for any consultation, lecture, discussion, writing, or appearance, the subject matter of which is devoted substantially to the responsibilities, programs, or operations of the Department of Commerce, or which draws substantially on official data or ideas which have not become part of the body of public information. As used in this paragraph, ''the body of public information'' shall mean information which has been disseminated widely among segments of the public which may be affected by or interested in the information concerned, or which is known by such segments of the public to be freely available on request to a Government agency.

(d) [Reserved]

(e) *Application of the limitations.* This section does not preclude an employee from:

(1) [Reserved]

(2) Participation in the activities of National or State political parties not proscribed by law.

(3) Participation in the affairs of, or acceptance of an award for a meritorious public contribution or achievement given by a charitable, religious, professional, social, fraternal, nonprofit educational and recreational, public service, or civic organization.

[32 FR 15222, Nov. 2, 1967, as amended at 33 FR 9765, July 6, 1968; 55 FR 53489, Dec. 31, 1990]

§ 0.735–13 Financial interests.

(a) An employee shall not: (1) Have a direct or indirect financial interest that conflicts substantially, or appears to conflict substantially, with his Government duties and responsibilities; or

(2) Engage in, directly or indirectly, a financial transaction as a result of, or primarily relying on, information obtained through his Government employment.

(b) No employee shall participate in any manner, on behalf of the United States, in the negotiation of contracts, the making of loans, and grants, the granting of subsidies, the fixing of rates, or the issuance of valuable permits or certificates, or in any investigation or prosecution, or in the transaction of any other official business, which affects chiefly a person with whom he has any economic interest or any pending negotiations concerning a prospective economic interest, except with express prior authorization as provided for in subpart G of this part.

(c) This section does not preclude an employee from having a financial interest or engaging in financial transactions to the same extent as a private citizen not employed by the Government so long as it is not prohibited by law, Executive order, Civil Service regulations (5 CFR Part 735), or regulations in this part.

(d) The financial (or economic) interests described below are too remote or too inconsequential to affect the integrity of an employee's services in any matter involving them, and are thereby exempted from the prohibitions of 18 U.S.C. 208(a), and do not exclude such employee's participation in the transaction of any official business involving such financial or economic interests:

Deposits in a bank, savings and loan association, building association, credit union or similar financial institution; policies held with an insurance company; constructive interests in companies and other entities owned or held by a mutual fund or other diversified investment company in which the employee has an interest.

These exempted financial (or economic) interests need not be reported by employees in their statements of employment and financial interests referred to in § 0.735–21.

(18 U.S.C. 208(b); 5 CFR 735.404a)

[32 FR 15222, Nov. 2, 1967, as amended at 41 FR 34939, Aug. 18, 1976; 47 FR 3350, Jan. 25, 1982]

§ 0.735–14 Use of Government time or property.

(a) An employee shall not directly or indirectly use, or allow the use of, Government time or property of any kind, including property leased to the Government, for other than officially approved activities.

(b) Each employee shall protect and conserve Government property, including equipment, supplies, and other property entrusted or issued to him.

§ 0.735–15 Misuse of employment or information.

(a) *Use of Government employment.* An employee shall not use his Government employment for a purpose that is, or gives the appearance of being, motivated by the desire for private gain for himself or another person, particularly one with whom he has family, business, or financial ties.

(b) *Use of inside information.* For the purpose of furthering a private interest, an employee shall not, except as provided in § 0.735–12(c), directly or indirectly use, or allow the use of, information which has been or has the appearance of having been obtained through or in connection with his Government employment and which has not been made available to the general public.

(c) *Coercion.* An employee shall not use his Government employment to coerce, or give the appearance of coercing, a person to provide financial benefit to himself or another person, particularly one with whom he has family, business, or financial ties.

(d) *Disclosure of restricted information.* No employee shall divulge restricted commercial or economic information, or restricted information concerning the personnel or operations of any Government agency, or release any such information in advance of the time prescribed for its authorized release.

(e) *Discrimination.* No employee, acting in his official capacity, shall, directly or indirectly, authorize, permit, or participate in any act or course of conduct which, on the ground of race, color, creed, national origin, or sex, excludes from participation, denies any benefit to, or otherwise subjects to discrimination any person under any program or activity administered or conducted by the Department or one of its units, or such employee. (See Department Order 195.)

§ 0.735–16 Indebtedness.

(a) An employee shall pay each just financial obligation in a proper and timely manner, especially one imposed by law such as Federal, State, or local taxes. For purposes of this section, ''a just financial obligation'' means one acknowledged by the employee or reduced to judgment by a court, and ''in a proper and timely manner'' means in a manner which, in the view of the Department, does not, under the circumstances, reflect adversely on the Government as his employer.

(b) In the event of dispute between an employee and an alleged creditor, this section does not require the Department to determine the validity or amount of the disputed debt.

§ 0.735–17 Gambling, betting, and lotteries.

An employee shall not participate while on Government-owned or leased property or while on duty for the Government, in any gambling activity including the operation of a gambling device, in conducting a lottery or pool, in a game for money or property or in selling or purchasing a numbers slip or ticket. However, this section does not preclude activities (a) necessitated by an employee's law enforcement duties, or (b) under section 3 of Executive Order 10927 (relating to solicitations conducted by organizations composed of civilian employees or members of the armed forces among their own members for organizational support or for benefit or welfare funds for their own members) and similar agency-approved activities.

§ 0.735–18 General conduct prejudicial to the Government.

(a) *General policy.* Officers and employees of the Federal Government are servants of the people. Because of this, their conduct must, in many instances, be subject to more restrictions and to higher standards than may be the case in certain private employments. They are expected to conduct themselves in a manner which will reflect favorably upon their employer. Although the Government is not particularly interested in the private lives of its employees, it does expect them to be honest, reliable, trustworthy, and of good character and reputation. They are expected to be loyal to the Government, and to the department or agency in which they are employed.

(b) *Specific policy.* An employee shall not engage in criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct, or other conduct prejudicial to the Government.

(c) *Regulations applicable to public buildings and grounds.* Each employee is responsible for knowing and complying with regulations of the General Services Administration and of the Department of Commerce applicable to public buildings and grounds.

§ 0.735–19 Reporting undue influence to superiors.

Each employee shall report to his superior any instance in which another person inside or outside the Federal Government uses or attempts to use undue influence to induce, by reason of his official Government position, former Government employment, family relationship, political position, or otherwise, the employee to do or omit to do any official act in derogation of his official duty.

Subpart E—Statements of Employment and Financial Interests

§ 0.735–20 General provisions.

(a) In order to carry out the purpose of this part, certain employees of the Department, specified in or pursuant to this part, will be required to submit statements of outside employment and financial interests for review designed to disclose conflicts of interest, apparent conflicts of interest on the part of employees, and other matters within the purview of this part.

(b) When a conflict or apparent conflict of interest on the part of an employee or other question of compliance with the provisions of this part arises and is not resolved at a lower level within the Department, e.g., by appropriate remedial action, the information concerning the matter shall be reported to the Secretary through the counselor for the Department designated in § 0.735–38.

(c) In the event of a conflict or apparent conflict of interest on the part of an employee or other question of compliance with the provisions of this part, the employee concerned shall be provided an opportunity to explain the matter. After consideration of the conflict or apparent conflict of interest or other question of compliance, and the employee's explanation thereof, appropriate action shall be taken.

§ 0.735–21 Form and content of statements.

(a) Statements of employment and financial interests shall be submitted as far as practicable on one of the following forms, as appropriate:

(1) Form CD–220, ''Confidential Statement of Employment and Financial Interests (For Use by Government Employees Other Than Special Government Employees)''; or

(2) Form CD–219, ''Confidential Statement of Employment and Financial Interests (For Use by Special Government Employees).''

(b) Each of the foregoing forms shall contain, as a minimum, the information required by the formats prescribed by the Office of Personnel Management in the Federal Personnel Manual. Questions on a statement of employment and financial interests that go beyond, or are in greater detail than, those included on the Office's formats may be included on a statement only with the approval of the Assistant Secretary for Administration and the Office.

(c) [Reserved]

(d) The employee will not be required to reveal precise amounts of financial interest when such information is not necessary for a proper determination as to whether there is any apparent conflict of interest.

[32 FR 15222, Nov. 2, 1967, as amended at 55 FR 53489, Dec. 31, 1990]

§ 0.735–22 Employees required to submit statements.

Except as provided in § 0.735–23, a statement of employment and financial interests shall be submitted by the following employees other than special Government employees:

(a) Employees paid at a level of the Executive Schedule in Subchapter II of Chapter 53 of Title 5, United States Code.

(b) Employees classified at GS–13 or above under section 5332 of Title 5, United States Code, or at a comparable pay level under another authority, who are in positions the basic duties and responsibilities of which are determined by the head of the operating unit concerned to require the incumbent to make a Government decision or to take a Government action in regard to:

(1) Contracting or procurement;

(2) Administering or monitoring grants or subsidies;

(3) Regulating or auditing private or other non-Federal enterprise; or

(4) Other activities where the decision or action has an economic impact on the interests of any non-Federal enterprise.

Each employee who occupies a position in one of the above-listed categories and who is not excluded from the reporting requirement shall be notified that he is subject to the reporting requirement.

(c) The following employees classified at GS–13 or above under section 5332 of Title 5, United States Code, or at a comparable pay level under another authority, not otherwise subject to paragraph (b) of this section:

(1) Employees in grade GS–16 or above, or in comparable or higher positions.

(2) Employees in Schedule C positions.

(3) Employees in hearing examiner or hearing officer positions.

(4) Persons employed as experts, consultants, or advisers.

(5) Employees in positions or categories of positions, regardless of their official title, identified in Appendix B of this part.

(d) Employees classified below GS–13 under section 5332 of Title 5, United States Code, or at a comparable pay level under another authority, who are in positions or categories of positions, regardless of their official title, identified in Appendix C to this part.

(e) *Appendices B and C.* (1) Appendix B to this part shall be maintained and changes made therein in accordance with the criteria in 5 CFR 735.403(c) and in accordance with the procedure in this paragraph. Appendix C to this part shall be maintained and changes made therein in accordance with the criteria in 5 CFR 735.403(d) and in accordance with the procedure in this paragraph.

(2) Heads of operating units and heads of offices in the Office of the Secretary shall, in conformity with the above-cited criteria, recommend changes in Appendix B and Appendix C to the Assistant Secretary for Administration for approval. Changes in Appendix C shall be submitted, with specific justification, to the Office of Personnel Management for further prior approval.

(3) Incumbents of positions added to Appendix B or to Appendix C shall become subject to the reporting requirements of this part upon receipt of notification that their position is subject to such requirements. Appendix B and Appendix C shall be republished annually to reflect changes in the lists.

[32 FR 15222, Nov. 2, 1967, as amended at 55 FR 53489, Dec. 31, 1990]

§ 0.735–22a Employee's complaint on filing requirement.

An employee shall have an opportunity for review through the Department of Commerce grievance procedure, as provided by Administrative Order 202–770, of a complaint by him that his position has been improperly included under the regulations of the Department as one requiring the submission of a statement of employment and financial interests.

§ 0.735–23 Employees not required to submit statements.

(a) Employees in positions that meet the criteria in paragraph (b), (c), or (d) of § 0.735–22 may be excluded from the reporting requirement when the head of the operating unit concerned determines that:

(1) The duties of a position are such that the likelihood of the incumbent's involvement in a conflicts-of-interest situation is remote; or

(2) The duties of a position are at such a level of responsibility that the submission of a statement of employment and financial interests is not necessary because of the degree of supervision and review over the incumbent or the inconsequential effect on the integrity of the Government.

(b) A statement of employment and financial interests is not required by this part from the Secretary of Commerce, from the head of an independent agency for which the Department of Commerce performs administrative services, or from a full-time member of a committee, board, or commission appointed by the President. These employees are subject to separate reporting requirements under section 401 of Executive Order 11222.

§ 0.735–24 Time and place for submission of original statements.

(a) An employee required to submit a statement of employment and financial interests under this part shall submit that statement not later than:

(1) Ninety days after the effective date of this part if the employee is employed by the Department on or before the effective date of this part; or

(2) Thirty days after the employee's entrance on duty date, but in no case earlier than 90 days after the effective date of this part.

(b) Statements shall be submitted to a personnel officer specified by the head of the operating unit or to such

other person as the head of the operating unit, with the approval of the Secretary, may specify. Secretarial officers and heads of operating units shall submit their statements to the Secretary or to such person as the Secretary may designate.

§ 0.735–25 Supplementary statements.

Changes in, or additions to, the information contained in an employee's statement of employment and financial interests shall be reported in a supplementary statement as of June 30 each year, except when the Office of Personnel Management authorizes a different date on a showing by the Department of necessity therefor. (The Commission has authorized filing of the supplementary statement for 1967 as of September 30, 1967.) If no changes or additions occur, a negative report is required. Notwithstanding the filing of the annual report required by this section, each employee shall at all times avoid acquiring a financial interest that could result, or taking an action that would result, in a violation of the conflicts-of-interest provisions of section 208 of Title 18, United States Code, or subpart D of this part.

[32 FR 15222, Nov. 2, 1967, as amended at 55 FR 53489, Dec. 31, 1990]

§ 0.735–26 Interests of employees' relatives.

The interest of a spouse, minor child, or other member of an employee's immediate household is considered to be an interest of the employee. For the purpose of this section, ''member of an employee's immediate household'' means those blood relations who are members of the employee's household.

§ 0.735–27 Information not known by employees.

If any information required to be included on a statement of employment and financial interests or supplementary statement, including holdings placed in trust, is not known to the employee but is known to another person, the employee shall request that other person to submit information in his behalf.

§ 0.735–28 Information not required.

This part does not require an employee to submit on a statement of employment and financial interests or supplementary statement any information relating to the employee's connection with, or interest in, a professional society or a charitable, religious, social, fraternal, recreational, public service, civic, or political organization or a similar organization not conducted as a business enterprise. For the purpose of this section, educational and other institutions doing research and development or related work involving grants of money from or contracts with the Government are deemed ''business enterprises'' and are required to be included in an employee's statement of employment and financial interests.

§ 0.735–29 Confidentiality of employees' statements.

(a) No employee may have access to a statement of employment and financial interests, or a supplementary statement, unless his official duties make access necessary. Each employee who has access to such a statement is responsible for maintaining it in confidence and shall not allow access to, or allow information to be disclosed from, a statement except to an employee of the Department of Commerce or the Office of Personnel Management to carry out the purpose of this part or to other persons as the Office of Personnel Management or the Assistant Secretary for Administration may determine for good cause shown. (The foregoing limitations do not apply to release of information by an employee with respect to a statement he has submitted under this section.)

(b) The employees designated in paragraph (b) of §0.735–24 to receive statements are authorized to review and retain the statements and are responsible for maintaining the statements in confidence, as provided in this section.

[32 FR 15222, Nov. 2, 1967, as amended at 55 FR 53489, Dec. 31, 1990]

§ 0.735–30 Relation of this part to other requirements.

(a) The requirement that employees submit statements of employment and financial interests and supplementary statements under this part is in addition to, and not in substitution for, or in derogation of, any similar requirement imposed by law, order, or regulation.

(b) The submission of a statement or supplementary statement by an employee does not permit him or any other person to participate in a matter in which his or the other person's participation is prohibited by law, order, or regulation, including this part.

§ 0.735–31 Special Government employees.

(a) Special Government employees shall be required to report:

(1) All other employment; and

(2) Financial interests specified on Form CD–219.

(b) A waiver may be granted to the requirements of this section in the case of a special Government employee who is not a consultant or expert (as defined in Chapter 304 of the Federal Personnel Manual) when a determination is made that the duties of the position held by that special Government employee are of such a nature and at such a level of responsibility that the submission of the statement by the incumbent is not necessary to protect the integrity of the Government. Any such waiver shall be approved by the head of the operating unit concerned or his designee. A copy of the waiver shall be filed with the deputy counselor for the organization unit concerned.

(c) The original statement of employment and financial interests required to be submitted by a special Government employee shall be submitted not later than his entry on duty. Each special employee shall keep his statement current throughout his employment with the Department by the submission of supplementary statements.

Subpart F—Supplementary Regulations

§ 0.735–32 Departmental.

The Assistant Secretary for Administration may prescribe supplementary instructions consistent with this part.

§ 0.735–33 Operating units.

Each operating unit is hereby authorized and directed to prescribe, after approval by the Assistant Secretary for Administration, such additional regulations not inconsistent with this part as may be necessary to effectuate the general purpose of this part in the light of its individual operating requirements, including but not limited to pertinent statutory provisions, such as:

(a) 35 U.S.C. 4, 122 (Patent Office);

(b) 46 U.S.C. 1111(b) (Maritime Administration);

(c) Certain provisions of the Defense Production Act of 1950, e.g., 50 U.S.C. App. 2160(b)(2) (avoidance of conflicts of interest), 50 U.S.C. App. 2160(b)(6) (financial statements), and 50 U.S.C. App. 2160(f) (prohibition of use of confidential information for purposes of speculation) (Business and Defense Services Administration and any other primary operating unit affected); and

(d) Certain provisions of Pub. L. 89–136, the Public Works and Economic Development Act of 1965, e.g., section 711 (restriction on employing certain EDA employees by applicants for financial assistance), and section 710(b) (embezzlement), false book entries, sharing in loans, etc., and giving out unauthorized information for speculation).

§ 0.735–34 Effective date of supplementary regulations.

Supplementary regulations prescribed pursuant to § 0.735–33, shall become effective upon approval by the issuing officer unless a different date is required by law or a later date is specified therein.

Subpart G—Administration

§ 0.735–35 Responsibilities of employees.

It is the responsibility of each employee:

(a) To assure, at the outset of his employment, that each of his interests and activities is consistent with the requirements established by or pursuant to this part;

(b) To submit a statement of employment and financial interests at such times and in such form as may be specified in or pursuant to this part;

(c) To certify, upon entering on duty in the Department, that he has read this part and applicable regulations supplementary thereto;

(d) To obtain prior written authorization of any interest or activity about the propriety of which any doubt exists in the employee's mind, as provided in § 0.735–39;

(e) To confine each of his interests and activities at all times within the requirements established by or pursuant to this part, including any authorizations granted pursuant to this part; and

(f) To obtain a further written authorization whenever circumstances change, or the nature or extent of the interest or activity changes, in such a manner as to involve the possibility of a violation or appearance of a violation of a limitation or requirement prescribed in or pursuant to this part.

§ 0.735–36 Responsibilities of operating units.

The head of each operating unit, or his designee, shall:

(a) Furnish or make available to each employee a copy of this part (or a comprehensive summary thereof) within 90 days after approval of this part by the Office of Personnel Management, and, upon their issuance, a copy of any regulations supplementary thereto (or a comprehensive summary thereof);

(b) Furnish or make available to each new employee at the time of his entrance on duty a copy of this part as it may be amended and any supplementary regulations (or a comprehensive summary thereof);

(c) Bring this part (or as it may be amended and any supplementary regulations thereto) to the attention of each employee annually, and at such other times as circumstances may warrant as may be determined by the Assistant Secretary for Administration;

(d) Have available for review by employees, as appropriate, copies of laws, Executive orders, this part, supplementary regulations, and pertinent Office of Personnel Management regulations and instructions relating to ethical and other conduct of Government employees;

(e) Advise each employee who is a special Government employee of his status for purposes of 18 U.S.C. 203 and 205;

(f) Require each employee specified in § 0.735–22 to submit a statement of employment and financial interests, as provided by or pursuant to this part;

(g) Develop an appropriate form, with the approval of the counselor of the Department, on which the employee may certify that he has read this part and applicable regulations supplementary thereto, in accordance with § 0.735–35(c), and on which he may, if he so desires, indicate that he has a private activity or interest about which he requests advice and guidance as provided by § 0.735–38.

(h) Require each employee upon entering on duty and at such other times as may be specified, to execute the certification required by § 0.735–35(c);

(i) Report to the program Secretarial Officer concerned and to the Assistant Secretary for Administration promptly any instance in which an employee, after notice, fails to submit the certification required under § 0.735–35(c) or a statement of employment or financial interests required under this part within 14 calendar days following the prescribed time limit for doing so; and

(j) Take action to impress upon each employee required to submit a statement of employment and financial interests, upon his supervisor, and upon employees with whom the employee works, their responsibility as follows:

(1) The employee's supervisor is responsible (i) for excluding from the range of duties of the employee any contracts or other transactions between the Government and his outside employer, clients, or entities in which he has an interest within the purview

of this part, and (ii) for overseeing the employee's activities in order to insure that the public interest is protected from improper conduct on his part and that he will not, through ignorance or inadvertence, embarrass the Government or himself.

(2) The employee's supervisor and employees with whom he works are responsible for avoiding the use of the employee's services in any situation in which a violation of law, regulation, or ethical standards is likely to occur or to appear to occur.

(3) The supervisor of an employee is responsible for initiating prompt and proper disciplinary or remedial action when a violation, intentional or innocent, is detected.

(4) Employees shall avoid divulging to a special Government employee privileged Government information which is not necessary to the performance of his governmental responsibility or information which directly involves the financial interests of his non-Government employer.

(5) An employee shall make every effort in his private work to avoid any personal contact with respect to negotiations with the Department for contracts, grants, or loans, if the subject matter is related to the subject matter of his Government employment. When this is not possible, he may participate if not otherwise prohibited by law (e.g., 18 U.S.C. 203 and 205) in the negotiations for his private employer only with the prior approval of the head of the operating unit concerned.

[32 FR 15222, Nov. 2, 1967, as amended at 55 FR 53489, Dec. 31, 1990]

§ 0.735–37 Procedure.

The review of statements of employment and financial interests shall include the following basic measures, among others:

(a) Statements shall be submitted to the designated officer, who will review each employee's statement of employment and financial interests to ascertain whether they are consistent with the requirements established by or pursuant to this part. (See § 0.735–24(b).)

(b) Where the statement raises any question of compliance with the requirements of this part, it shall be submitted to a deputy counselor for the organization unit concerned. The deputy counselor may, in his discretion, utilize the advice and services of others (including departmental facilities) to obtain further information needed to resolve the questions.

(c) The designated officer shall maintain the statements of employment and financial interests in a file apart from the official personnel files and shall take every measure practicable to insure their confidentiality. Statements of employment and financial interests shall be preserved for 5 years following the separation of an employee from the Department or following termination of any other relationship under which the individual rendered service to the Department, except as may be otherwise authorized by the Assistant Secretary for Administration or as required by law.

§ 0.735–38 Availability for counseling.

(a) The General Counsel of the Department shall:

(1) Serve as the counselor for the Department of Commerce with respect to matters covered by the basic provisions cited in § 0.735–2(a) and otherwise by or pursuant to this part;

(2) Serve as the Department of Commerce designee to the Office of Personnel Management on matters covered by this part; and

(3) Coordinate the counseling services provided under this part and assure that counseling and interpretations on questions of conflicts of interest and other matters covered by this part are available to deputy counselors designated under paragraph (b) of this section.

(b) The counselor shall designate employees who shall serve as deputy counselors for employees of the Department of Commerce with respect to matters covered by or pursuant to this part and shall give authoritative advice and guidance to each employee who seeks advice and guidance on questions of conflict of interests and other matters covered by or pursuant to this part.

(c) Each operating unit shall notify its employees of the availability of counseling services and of how and where these services are available. This notification shall be given within 90 days after approval of this part by the

Office of Personnel Management and periodically thereafter. In the case of a new employee appointed after the foregoing notification, notification shall be made at the time of his entrance on duty.

(d) In each operating unit a deputy counselor shall advise and counsel each employee concerning any adjustments necessary in his financial interests or activities, or in any contemplated interests or activities, in order to meet the requirements established by or pursuant to this part.

[32 FR 15222, Nov. 2, 1967, as amended at 55 FR 53489, Dec. 31, 1990]

§ 0.735–39 Authorizations.

All requests for authorizations required under this part shall be addressed to the head of the operating unit concerned. In the Office of the Secretary such requests shall be addressed to the Secretary or such person as he may designate. When granted, authorizations will be in writing, and a copy of each authorization will be filed in the employees' official personnel file.

(a) In case of doubt, or upon the request of the employee concerned, cases or questions will be forwarded to the counselor or a deputy counselor. (See § 0.735–38.)

(b) Where an activity requested to be authorized can be conducted as official business, it shall not be authorized as a private activity, but shall be conducted as official business.

(c) Where authorizations involve speaking, writing, or teaching, use of the official title of the employee for identification purposes may be authorized, provided the employee makes it clear that his statements and actions are not of an official nature.

(d) If an authorization has been granted for a specific activity or interest, and the activity or interest is subsequently deemed to constitute a violation of the limitations or requirements prescribed in or pursuant to this part, the employee concerned shall be notified in writing of the cancellation of the authorization and shall modify or stop the activity or interest involved, as requested.

§ 0.735–40 Disciplinary and other remedial action.

(a) Violation of a requirement established in or pursuant to this part shall be cause for appropriate disciplinary action, which may be in addition to any penalty prescribed by law.

(b) When, after consideration of the explanation of the employee provided by § 0.735–20(c), the reviewing officer, in cooperation with the responsible supervisory official, decides that remedial action is required, he will take or cause to be taken immediate action to end the conflict or appearance of conflict of interest. Remedial action may include, but is not limited to:

(1) Changes in assigned duties;

(2) Divestment by the employee of his conflicting interest;

(3) Disciplinary action (including removal from the service); or

(4) Disqualification for a particular assignment.

Remedial action, whether disciplinary or otherwise, shall be effected in accordance with applicable laws, Executive orders, and regulations.

(c) No disciplinary or remedial action may be taken under this section against an employee of another Federal department or agency on detail to the Department of Commerce other than through and with the concurrence of the detailed employee's employing agency.

§ 0.735–41 Inquiries and exceptions.

(a) Inquiries relating to legal aspects of the limitations set forth in or cited in or pursuant to this part should be submitted to the appropriate deputy counselor. Inquiries relating to other aspects of this part or regulations supplementary thereto should be referred to the appropriate personnel office.

(b) Within the limits of administrative discretion permitted to the Department, exceptions to the requirements of this part may be granted from time to time in unusual cases by the head of the operating unit, whenever the facts indicate that such an exception would promote the efficiency of the service. Each request for such an exception should be submitted in writing to the head of the operating unit concerned, and shall contain a full statement of the justification for the

request. Reports concerning such requests, if approved, shall be forwarded to the program Secretarial Officer concerned and to the Assistant Secretary for Administration by the head of the operating unit concerned.

Subpart H—Disciplinary Actions Concerning Post-Employment Conflict of Interest Violations

AUTHORITY: 18 U.S.C. 207(j); 5 CFR 737.27.

SOURCE: 49 FR 32057, Aug. 10, 1984; 50 FR 928, Jan. 8, 1985, unless otherwise noted.

§ 0.735–42 Scope.

(a) These regulations establish procedures for imposing sanctions against a former employee for violating the post-employment restrictions of the conflict of interest laws and regulations set forth in 18 U.S.C. 207 and 5 CFR Part 737. These procedures are established pursuant to the requirement in 18 U.S.C. 207(j). The General Counsel is responsible for resolving questions on the legal interpretation of 18 U.S.C. 207 or regulations issued thereunder and for advising employees on these provisions.

(b) For purposes of this subpart, (1) ''Former employee'' means a former Government employee as defined in 5 CFR 737.3(a)(4) who had served in the Department;

(2) ''Lesser included sanctions'' means sanctions of the same type but more limited scope as the proposed sanction; thus a bar on communication with an operating unit is a lesser included sanction of a proposed bar on communication with the Department and a bar on communication for one year is a lesser included sanction of a proposed five year bar;

(3) ''Assistant Secretary'' means the Assistant Secretary for Administration or designee;

(4) ''Director'' means the Director for Personnel and Civil Rights, Office of the Secretary, or designee;

(5) ''Inspector General'' and ''General Counsel'' include any persons designated by them to perform their functions under this subpart; and

(6) ''Days'' means calendar days except that a dead-line which falls on a weekend or holiday shall be extended to the next working day.

§ 0.735–43 Report of violations and investigation.

(a) If an employee has information which indicates that a former employee has violated any provisions of 18 U.S.C. 207 or regulations thereunder, that employee shall report such information to the Inspector General.

(b) Upon receiving information as set forth in paragraph (a) of this section from an employee or any other person, the Inspector General, upon a determination that it is nonfrivolous, shall expeditiously provide the information to the Director, Office of Government Ethics, and to the Criminal Division, Department of Justice. The Inspector General shall coordinate any investigation under this subpart with the Department of Justice, unless the Department of Justice informs the Inspector General that it does not intend to initiate criminal prosecution.

(c) All investigations under this subpart shall be conducted in such a way as to protect the privacy of former employees. To ensure this, to the extent reasonable and practical, any information received as a result of an investigation shall remain confidential except as necessary to carry out the purposes of this subpart, including the conduct of an investigation, hearing, or judicial proceeding arising thereunder, or as may be required to be released by law.

(d) The Inspector General shall report the findings of the investigation to the Director.

§ 0.735–44 Initiation of proceedings.

If the Director determines, after an investigation by the Inspector General, that there is reasonable cause to believe that a former employee has violated post-employment statutes or regulations, the Director shall initiate administrative proceedings under this subpart by proposing sanctions against the former employee and by providing notice to the former employee as set forth in § 0.735–45.

§ 0.735–45 Notice.

(a) The Director shall notify the former employee of the proposed disciplinary action in writing by registered or certified mail, return receipt requested, or by any means which gives actual notice or is reasonably calculated to give actual notice. Notice shall be considered received if sent to the last known address of the former employee.

(b) The notice shall include: (1) A statement of allegations and the basis thereof sufficiently detailed to enable the former employee to prepare a defense;

(2) A statement that the former employee is entitled to a hearing if requested within 20 days from date of notice;

(3) An explanation of the method by which the former employee may request a hearing under this subpart including the name, address, and telephone number of the person to contact if there are further questions;

(4) A statement that the former employee has the right to submit documentary evidence to the Director if a hearing is not requested and an explanation of the method of submitting such evidence and the date by which it must be received; and

(5) A statement of the sanctions which have been proposed.

§ 0.735–46 Hearing.

(a) *Examiner.* (1) Upon timely receipt of a request for a hearing, the Director shall refer the matter to the Assistant Secretary who shall appoint an examiner to conduct the hearing and render an initial decision.

(2) The examiner shall be impartial, shall not be an individual who has participated in any manner in the decision to initiate the proceedings, and shall not have been employed under the immediate supervision of the former employee or have been employed under a common immediate supervisor. The examiner shall be admitted to practice law and have suitable experience and training to conduct the hearing, reach a determination and render an initial decision in an equitable manner.

(b) *Time, date, and place.* The hearing shall be conducted at a reasonable time, date, and place as set by the examiner. In setting the date, the examiner shall give due regard to the need for both parties to adequately prepare for the hearing and the importance of expeditiously resolving allegations that may be damaging to the former employee's reputation.

(c) *Former employee's rights.* At a hearing, the former employee shall have the right:

(1) To represent himself or herself or to be represented by counsel,

(2) To introduce and examine witnesses and to submit physical evidence,

(3) To confront and cross-examine adverse witnesses,

(4) To present oral argument, and

(5) To receive a transcript or recording of the proceedings, on request.

(d) *Procedure and evidence.* In a hearing under this subpart, the Federal Rules of Evidence and Civil Procedure do not apply but the examiner shall exclude irrelevant or unduly repetitious evidence and all testimony shall be taken under oath or affirmation. The examiner may make such orders and determinations regarding the admissibility of evidence, conduct of examination and cross-examination, and similar matters which the examiner deems necessary or appropriate to ensure orderliness in the proceedings and fundamental fairness to the parties. There shall be no discovery unless agreed to by the parties and ordered by the examiner. The hearing shall not be open to the public unless the former employee or the former employee's representative waives the right to a closed hearing, in which case the examiner shall determine whether the hearing will be open to the public.

(e) *Ex-parte communications.* The former employee, the former employee's representative, and the agency representative shall not make any ex-parte communications to the examiner concerning the merits of the allegations against the former employee prior to the issuance of the initial decision.

(f) *Initial decision.* (1) The proposed sanctions shall be sustained in an initial decision upon a determination by the examiner that the preponderance of the evidence indicated a violation of post-employment statutes or regulations.

(2) The examiner shall issue an initial decision which is based exclusively on the transcript of testimony and exhibits together with all papers and requests filed in connection with the proceeding and which sets forth all findings of fact and conclusions of law relevant to the matter at issue.

(3) The initial decision shall become final thirty days after issuance if there has been no appeal filed under §0.735–48.

§0.735–47 Decision absent a hearing.

(a) If the former employee does not request a hearing in a timely manner, the Director shall make an initial decision on the basis of information compiled in the investigation, and any submissions made by the former employee.

(b) The proposed sanction or a lesser included sanction shall be imposed if the record indicates a violation of post-employment statutes or regulations by a preponderance of the evidence.

(c) The initial decision shall become final thirty days after issuance if there has been no appeal filed under §0.735–48.

§0.735–48 Administrative appeal.

(a) Within 30 days after issuance of the initial decision, either party may appeal the initial decision or any portion thereof to the Assistant Secretary. The opposing party shall have 20 days to respond.

(b) If an appeal is filed, the Assistant Secretary shall issue a final decision which shall be based solely on the record, or portions thereof cited by the parties to limit issues, and the appeal and response. The Assistant Secretary shall also decide whether to impose the proposed sanction or a lesser included sanction.

(c) If the final decision modifies or reverses the initial decision, it shall state findings of fact and conclusions of law which differ from the initial decision.

§0.735–49 Sanctions.

(a) If there has been a final determination that the former employee has violated post-employment statutes or regulations, the Director shall impose, subject to the authority of the Assistant Secretary under §0.735–48(b), the sanction which was proposed in the notice to the former employee or a lesser included sanction.

(b) Sanctions which may be imposed include: (1) Prohibiting the former employee from making, on behalf of any other person except the United States, any formal or informal appearance before or, with the intent to influence, any oral or written communication to the Department or any organizational sub-unit thereof on any matter of business for a period not to exceed five years; and

(2) Other appropriate disciplinary action.

(c) The Director may enforce the sanctions of paragraph (b)(1) of this section by directing any or all employees to refuse to participate in any such appearance or to accept any such communication. As a method of enforcement, the Director may establish a list of former employees against whom sanctions have been imposed.

§0.735–50 Judicial review.

Any former employee found to have violated 18 U.S.C. 207, or regulations issued thereunder, by a final administrative decision under this subpart may seek judicial review of the administrative determination.

APPENDIX A TO PART 0—STATUTES GOVERNING CONDUCT OF FEDERAL EMPLOYEES

There are numerous statutes pertaining to the ethical and other conduct of Federal employees, far too many to attempt to list them all. Consequently, only the more important ones of general applicability are referred to in this appendix.

A. BRIBERY AND GRAFT

.01 Title 18, U.S.C., section 201, prohibits anyone from bribing or attempting to bribe a public official by corruptly giving, offering, or promising him or any person selected by him, anything of value with intent (a) to influence any official act by him, (b) to influence him to commit or allow any fraud on the United States, or (c) to induce him to do or omit to do any act in violation of his lawful duty. As used in section 201, ''Public officials'' is broadly defined to include officers, employees, and other persons carrying on activities for or on behalf of the Government.

.02 Section 201 also prohibits a public official's solicitation or acceptance of, or agreement to take, a bribe. In addition, it forbids

offers or payments to, and solicitations or receipt by, a public official of anything of value ''for or because of'' any official act performed or to be performed by him.

.03 Section 201 further prohibits the offering to or the acceptance by a witness of anything of value involving intent to influence his testimony at a trial, Congressional hearing, or agency proceeding. A similar provision applies to witnesses ''for or because of'' testimony given or to be given. The provisions summarized in this section do not preclude lawful witness fees, travel and subsistence expenses, or reasonable compensation for expert testimony.

B. COMPENSATION TO OFFICERS AND EMPLOYEES IN MATTERS AFFECTING THE GOVERNMENT

.01 Title 18, U.S.C., section 203, prohibits an officer or employee from receiving compensation for services rendered for others before a Federal department or agency in matters in which the Government is a party or is interested.

.02 Section 203 applies to a special Government employee as follows:

a. If the special Government employee has served in the Department of Commerce more than 60 days during the preceding period of 365 days, section 203 applies to him only in relation to a particular matter involving a specific party or parties (1) in which he has at any time participated personally and substantially in his governmental capacity, or (2) which is pending in the Department of Commerce; or

b. If the special Government employee has served in the Department no more than 60 days during the preceding period of 365 days, section 203 applies to him only in relation to a particular matter involving a specific party or parties in which he has at any time participated personally and substantially in his governmental capacity.

.03 Section 203 does not apply to a retired officer of the uniformed services while not on active duty and not otherwise an officer or employee of the United States.

C. ACTIVITIES OF OFFICERS AND EMPLOYEES IN CLAIMS AGAINST AND OTHER MATTERS AFFECTING THE GOVERNMENT

.01 Title 18, U.S.C., section 205, prohibits an officer or employee, otherwise than in the performance of his official duties, from:

a. Acting as agent or attorney for prosecuting any claim against the United States, or receiving any gratuity, or any share of or interest in any such claim in consideration of assistance in the prosecution of such claims; or

b. Acting as agent or attorney for anyone before any Government agency, court, or officer in connection with any matter in which the United States is a party or has a direct and substantial interest.

.02 Section 205 applies to a special Government employee as follows:

a. If the special Government employee has served in the Department more than 60 days during the preceding period of 365 days, section 205 applies to him only in relation to a particular matter involving a specific party or parties (1) in which he has at any time participated personally and substantially in his governmental capacity, or (2) which is pending in the Department of Commerce; or

b. If the special Government employee has served in the Department no more than 60 days during the preceding period of 365 days, section 205 applies to him only in relation to a particular matter involving a specific party or parties in which he has at any time participated personally and substantially in his governmental capacity.

.03 Section 205 does not preclude:

a. An employee, if not inconsistent with faithful performance of his duties, from acting without compensation as agent or attorney for any person who is the subject of disciplinary, loyalty, or other personnel administration proceedings, in connection with those proceedings; or

b. An employee from giving testimony under oath or from making statements required to be made under penalty for perjury or contempt.

.04 Sections 203 and 205 do not preclude:

a. An employee from acting as agent or attorney for his parents, spouse, child, or any person for whom, or for any estate for which, he is serving as guardian, executor, administrator, trustee, or other personal fiduciary, except in those matters in which he has participated personally and substantially as a Government employee or which are the subject of his official responsibility, provided the head of the operating unit concerned approves; or

b. A special Government employee from acting as agent or attorney for another person in the performance of work under a grant by, or a contract with, or for the benefit of, the United States, provided the head of the operating unit concerned, with the approval of the appropriate program Secretarial Officer, shall certify in writing that the national interest so requires, and such certification shall be published in the FEDERAL REGISTER.

.05 Section 205 does not apply to a retired officer of the uniformed services while not on active duty and not otherwise an officer or employee of the United States.

D. DISQUALIFICATION OF FORMER OFFICERS AND EMPLOYEES IN MATTERS CONNECTED WITH FORMER DUTIES OR OFFICIAL RESPONSIBILITIES; DISQUALIFICATION OF PARTNERS

.01 Title 18 U.S.C., section 207:

a. Provides that a former Government officer or employee, including a former special Government employee, shall be permanently

barred from acting as agent or attorney for anyone other than the United States in any matter in which the United States is a party or is interested and in which he participated personally and substantially in a governmental capacity;

b. Bars a former Government officer or employee, including a special Government employee, of an agency, for a period of 1 year after his employment with it has ceased, from appearing personally as agent or attorney for another person before any court or agency in connection with a matter in which the Government has an interest and which was under his official responsibility at the employing agency (e.g., Department of Commerce) at any time within 1 year prior to the end of such responsibility; and

c. Prohibits a partner of a person employed by the Government, including a special Government employee, from acting as agent or attorney for anyone other than the United States in matters in which the employee participates or has participated personally and substantially for the Government or which are the subject of his official responsibility.

.02 Subparagraphs .01a. and .01b. of this section do not prevent a former officer or employee or special Government employee who has outstanding scientific or technical qualifications from acting as attorney or agent or appearing personally before the Department of Commerce in connection with a particular matter in a scientific or technological field if the Assistant Secretary of Commerce for Science and Technology shall make a certification in writing, published in the FEDERAL REGISTER, that the national interest would be served by such action or appearance by the former officer or employee.

E. ACTS AFFECTING A PERSONAL FINANCIAL INTEREST

.01 Title 18, U.S.C., section 208 prohibits an officer or employee, including a special Government employee, from participating personally and substantially in a governmental capacity in any matter in which, to his knowledge, he, his spouse, minor child, partner, organization in which he is serving as officer, director, trustee, partner, or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest.

.02 Section 208 does not apply:

a. If the officer or employee first advises the head of the operating unit concerned of the nature and circumstances of the matter involved, makes full disclosure of the financial interest, and receives in advance a written determination made by such official, with the approval of the appropriate program Secretarial Officer, that the interest is not so substantial as to be deemed likely to affect the integrity of the services which the Government may expect from the officer or employee; or

b. If, by general rule or regulation published in the FEDERAL REGISTER, the financial interest has been exempted from the requirements of section 208 as being too remote or too inconsequential to affect the integrity of Government officers' or employees' services.

F. SALARY OF GOVERNMENT OFFICIALS AND EMPLOYEES

.01 Title 18, U.S.C., section 209, prohibits:

a. An officer or employee from receiving any salary, or any contribution to or supplementation of salary, as compensation for his services as an officer or employee of the United States from any source other than the Government of the United States, except as may be contributed out of the treasury of a State, county, or municipality; and

b. Any person or organization from paying, contributing to, or supplementing the salary of an officer or employee under circumstances which would make its receipt a violation of subparagraph .01a. of this section.

.02 Section 209:

a. Does not prevent a Government employee from continuing to participate in a bona fide pension or other welfare plan maintained by a former employer;

b. Exempts special Government employees and employees serving the Government without compensation, and grants a corresponding exemption to any outside person paying compensation to such individuals; and

c. Does not prohibit the payment or acceptance of sums under the terms of the Government Employees Training Act.

G. CODE OF ETHICS FOR GOVERNMENT SERVICE

''Code of Ethics for Government Service,'' House Concurrent Resolution 175, 85th Congress, 2d Session, 72 Stat. B12 of July 11, 1958, which reads as follows:

''Any Person in Government Service Should:

''Put loyalty to the highest moral principles and to country above loyalty to persons, party, or Government department.

''UPHOLD the Constitution, laws, and legal regulations of the United States and all governments therein and never be a party to their evasion.

''GIVE a full day's labor for a full day's pay; giving to the performance of his duties his earnest effort and best thought.

''SEEK to find and employ more efficient and economical ways of getting tasks accomplished.

''NEVER discriminate unfairly by the dispensing of special favors or privileges to anyone, whether for remuneration or not; and never accept for himself or his family, favors or benefits under circumstances which might

be construed by reasonable persons as influencing the performance of his governmental duties.

''MAKE no private promises of any kind binding upon the duties of office, since a Government employee has no private word which can be binding on public duty.

''ENGAGE in no business with the Government, either directly or indirectly, which is inconsistent with the conscientious performance of his governmental duties.

''NEVER use any information coming to him confidentially in the performance of governmental duties as a means for making private profit.

''EXPOSE corruption wherever discovered.

''UPHOLD these principles, ever conscious that public office is a public trust.''

H. PROHIBITIONS

.01 The prohibition against lobbying with appropriated funds (18 U.S.C. 1913) reads as follows:

''No part of the money appropriated by any enactment of Congress shall, in the absence of express authorization by Congress, be used directly or indirectly to pay for any personal service, advertisement, telegram, telephone, letter, printed or written matter, or other device, intended or designed to influence in any manner a Member of Congress, to favor or oppose, by vote or otherwise, any legislation or appropriation by Congress, whether before or after the introduction of any bill or resolution proposing such legislation or appropriation, but this shall not prevent officers or employees of the United States or of its departments or agencies from communicating to Members of Congress on the request of any Member or to Congress, through the proper official channels, requests for legislation or appropriations which they deem necessary for the efficient conduct of the public business.

''Whoever, being an officer or employee of the United States or of any department or agency thereof, violates or attempts to violate this section, shall be fined not more than $500 or imprisoned not more than 1 year, or both; and after notice and hearing by the superior officer vested with the power of removing him, shall be removed from office or employment.''

.02 The prohibitions against disloyalty and striking (5 U.S.C. 7311, 18 U.S.C. 1918). An individual may not accept or hold a position in the Government of the United States if he:

a. Advocates the overthrow of our constitutional form of government;

b. Is a member of an organization that he knows advocates the overthrow of our constitutional form of government;

c. Participates in a strike, or asserts the right to strike, against the Government of the United States or the government of the District of Columbia; or

d. Is a member of an organization of employees of the Government of the United States or of individuals employed by the government of the District of Columbia that he knows asserts the right to strike against the Government of the United States or the government of the District of Columbia.

.03 The prohibition against employment of a member of a Communist organization (50 U.S.C. 784).

.04 The prohibitions against (a) the disclosure of classified information (18 U.S.C. 798, 50 U.S.C. 788); and (b) the disclosure of confidential information (18 U.S.C. 1905). Each employee who has access to classified information, e.g., confidential, secret, or top secret, or to a restricted area is responsible for knowing and for complying strictly with the security regulations of the Department of Commerce. (See Administrative Order 207–2.)

.05 The prohibition against employment in the competitive civil service of any person who habitually uses intoxicating beverages to excess (5 U.S.C. 7352).

.06 The prohibition against the misuse of a Government vehicle (31 U.S.C. 638a(c)). No employee may willfully use or authorize the use of a Government-owned or Government-leased passenger motor vehicle or aircraft for other than official purposes.

.07 The prohibition against the use of the franking privilege to avoid payment of postage on private mail (18 U.S.C. 1719).

.08 The prohibition against the use of deceit in an examination or personnel action in connection with Government employment (18 U.S.C. 1917).

.09 The prohibition against fraud or false statements in a Government matter (18 U.S.C. 1001). An employee in connection with an official matter shall not knowingly and willfully conceal or cover up a material fact or falsify official papers or documents.

.10 The prohibition against mutilating or destroying a public record (18 U.S.C. 2071). No employee may conceal, remove, mutilate, or destroy Government documents or records except for the disposition of records in accordance with law or regulation.

.11 The prohibition against counterfeiting and forging transportation requests (18 U.S.C. 508). Falsely making, altering or forging, in whole or in part, any form of transportation request is prohibited.

.12 The prohibitions against:

a. Embezzlement of Government money or property (18 U.S.C. 641). No employee may convert any Government money or Government property to his own use or the use of another person.

b. Failure to account for public money (18 U.S.C. 643). Any employee, who, having received public money which he is not authorized to retain, fails to render his accounts for same as provided by law, is guilty of embezzlement.

c. Embezzlement of the money or property of another person in the possession of the employee by reason of his employment (18 U.S.C. 654). An employee is prohibited from embezzling or wrongfully converting for his own use the money or property of another which comes under his control as the result of his employment.

.13 The prohibition against unauthorized removal or use of documents relating to claims from or by the Government (18 U.S.C. 285). No employee, without authority, may remove from the place where it was kept by authority of the United States any document, record, file, or paper intended to be used to procure the payment of money from or by the United States or the allowance or payment of any claim against the United States, regardless of whether the document or paper has already been used or the claim has already been allowed or paid; and no employee may use or attempt to use any such document, record, file, or paper to procure the payment of any money from or by the United States or the allowance or payment of any claim against the United States.

.14 The prohibition against proscribed political activities, including the following, among others:

a. Using official authority or influence for the purpose of interfering with or influencing the result of an election, except as authorized by law (5 U.S.C. 7324);

b. Taking an active part in political management or in political campaigns, except as authorized by law (5 U.S.C. 7324);

c. Offering or promising to pay anything of value in consideration of the use of, or promise to use, any influence to procure any appointive office or place under the United States for any person (18 U.S.C. 210);

d. Soliciting or receiving, either as a political contribution or for personal emolument, anything of value in consideration of a promise of support or use of influence in obtaining for any person any appointive office or place under the United States (18 U.S.C. 211);

e. Using official authority to interfere with a Federal election (18 U.S.C. 595);

f. Promising any employment compensation, or other benefit made possible by Act of Congress in consideration of political activity or support (18 U.S.C. 600);

g. Action by a Federal officer or employee to solicit or receive, or to be in any manner concerned with soliciting or receiving, any contribution for any political purpose whatever from any other Federal officer or employee or from any person receiving compensation for services from money derived from the Treasury of the United States (18 U.S.C. 602);

h. Soliciting or receiving (by any person) anything of value for any political purpose whatever on any Government premises (18 U.S.C. 603);

i. Soliciting or receiving contributions for political purposes from anyone on Federal relief or work relief (18 U.S.C. 604);

j. Payment of a contribution for political purposes by any Federal officer or employee to another Federal officer or employee (18 U.S.C. 607); and

k. Payment of a political contribution in excess of statutory limitations and purchase of goods, commodities, advertising, or articles the proceeds of which inure to the benefit of certain political candidates or organizations (18 U.S.C. 608).

.15 The prohibition against an employee acting as the agent of a foreign principal registered under the Foreign Agents Registration Act (18 U.S.C. 219).

APPENDIX B TO PART 0—POSITION CATEGORIES, GRADE GS–13, AND ABOVE, REQUIRING STATEMENTS OF EMPLOYMENT AND FINANCIAL INTERESTS BY INCUMBENTS

(1) Auditors.

(2) Attorneys other than attorneys engaged in patent examining or trademark examining operations.

(3) Heads of divisions or comparable organization units, GS–15 or above.

(4) Heads of field offices or installations, GS–15 or above.

(5) Employees in positions involving assigned duties and responsibilities which require the incumbent to make fact-finding determinations or to exercise judgment in recommending a decision or an action in regard to:

a. Evaluation, appraisal, or selection of contractors or sub-contractors, prospective contractors or prospective subcontractors, proposals of such contractors or subcontractors, the activities performed by such contractors or subcontractors, or determination of the extent of compliance of such contractors or subcontractors with contract provisions.

b. Negotiation, modification, or approval of contracts or subcontracts.

c. Evaluation, appraisal, or selection of prospective project sites, or locations of work or activities, including real property proposed for acquisition by purchase or otherwise.

d. Inspection and quality assurance of material, products, or components for acceptability.

e. Review or approval for access permits.

f. Technical planning or design which involves the preparation of specifications or technical requirements.

g. Negotiation of agreements for cooperation or implementing arrangements with foreign countries, international organizations, or non-Federal enterprises.

h. Analysis, evaluation, or review of license applications.

i. Analysis, evaluation, or review of licensees' compliance with Department of Commerce regulations and requirements.

j. Utilization or disposal of excess or surplus property.

k. Procurement of materials, services, supplies, or equipment.

l. Authorization or monitoring of grants or subsidies to educational institutions or other non-Federal enterprises.

m. Audit of financial transactions.

n. Promulgation of safety standards, procedures, and hazards evaluation systems.

o. Other activities where the decision or action has a substantial economic impact on the interests of a non-Federal enterprise.

APPENDIX C TO PART 0—POSITION CATEGORIES BELOW GS–13 REQUIRING STATEMENTS OF EMPLOYMENT AND FINANCIAL INTERESTS BY INCUMBENTS

(1) Employees in the National Marine Fisheries Service, National Oceanic and Atmospheric Administration, who are in the following categories of positions:

(a) Special Agents (Fish and Wildlife), Series GS–1812, grades 5 through 12.

(b) Fishery Products Inspectors, Series GS–1863, grades 5 through 12.

(5 CFR 735.104, 735.403)

[50 FR 2276, Jan. 16, 1985]

PART 1—THE SEAL OF THE DEPARTMENT OF COMMERCE

Sec.
1.1 Purpose.
1.2 Description and design.
1.3 Delegation of authority.

AUTHORITY: Sec. 1, 32 Stat. 825, as amended, 15 U.S.C. 1501.

SOURCE: 33 FR 9337, June 26, 1968, unless otherwise noted.

§ 1.1 Purpose.

The purpose of this part is to describe the seal of the Department of Commerce and to delegate authority to affix the seal to certifications and documents of the Department.

§ 1.2 Description and design.

(a) The Act of February 14, 1903 (32 Stat. 825, as amended) (15 U.S.C. 1501), which established the Department of Commerce, provided that ''The said Secretary shall cause a seal of office to be made for the said department of such device as the President shall approve, and judicial notice shall be taken of the said seal.'' On April 4, 1913, the President approved and declared to be the seal of the Department of Commerce the device which he described as follows:

Arms: Per fesse azure and or, a ship in full sail on waves of the sea, in chief proper; and in base a lighthouse illumined proper.

Crest: The American Eagle displayed. Around the Arms, between two concentric circles, are the words:

DEPARTMENT OF COMMERCE

UNITED STATES OF AMERICA

(b) The design of the approved seal is as shown below. Where necessitated by requirements of legibility, immediate comprehension, or clean reproduction, the concentric circles may be eliminated from the seal on publications and exhibits, and in slides, motion pictures, and television. In more formal uses of the seal, such as on letterheads, the full, proper rendition of the seal shall be used.

(c) The official symbolism of the seal shall be the following: The ship is a symbol of commerce; the blue denotes uprightness and constancy; the lighthouse is a well-known symbol representing guidance from the darkness which is translated to commercial enlightenment; and the gold denotes purity. The crest is the American bald eagle denoting the national scope of the Department's activities. (The above is a modification of the original symbolism issued with the President's approval of the seal, made necessary by

changes in the functions of the Department.)

§1.3 Delegation of authority.

(a) Pursuant to authority vested in the Secretary of Commerce by law, (1) the Chief Administrative Officer of each operating unit, and (2) the Director, Office of Administrative Services in the Office of the Secretary, are hereby authorized to sign as Certifying Officers certifications as to the official nature of copies of correspondence and records from the files, publications and other documents of the Department and to affix the seal of the Department of Commerce to such certifications or documents for all purposes, including the purpose authorized by 28 U.S.C. 1733(b).

(b) Delegations of authority to persons other than those named in paragraph (a) of this section may be made by the Assistant Secretary for Administration.

(c) This delegation shall not affect or prejudice the use of properly authorized office or bureau seals in appropriate cases.

PART 2—PROCEDURES FOR HANDLING AND SETTLEMENT OF CLAIMS UNDER THE FEDERAL TORT CLAIMS ACT

Sec.
2.1 Purpose.
2.2 Provisions of law and regulations thereunder.
2.3 Delegation of authority.
2.4 Procedure for filing claims.
2.5 Adjudication and settlement of claims.
2.6 Payment of claims.
2.7 Annual report.
2.8 Supplementary regulations.

AUTHORITY: Sec. 2672, 62 Stat. 983, as amended; 28 U.S.C. 2672.

§2.1 Purpose.

(a) The purpose of this part is to delegate authority to settle or deny claims under the Federal Tort Claims Act (in part, 28 U.S.C. 2671–2680) as amended by Pub. L. 89–506, 80 Stat. 306, and to establish procedures for the administrative adjudication of such claims accruing on or after January 18, 1967.

[32 FR 3769, Mar. 7, 1967, as amended at 48 FR 31636, July 11, 1983]

§2.2 Provisions of law and regulations thereunder.

(a) Section 2672 of Title 28, U.S. Code, as above amended, provides that:

The head of each Federal agency or his designee, in accordance with regulations prescribed by the Attorney General, may consider, ascertain, adjust, determine, compromise, and settle any claim for money damages against the United States for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the agency while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred: *Provided*, that any award, compromise, or settlement in excess of $25,000 shall be effected only with the prior written approval of the Attorney General or his designee.

Subject to the provisions of this title relating to civil actions on tort claims against the United States, any such award, compromise, settlement, or determination shall be final and conclusive on all officers of the Government, except when procured by means of fraud.

Any award, compromise, or settlement in an amount of $2,500 or less made pursuant to this section shall be paid by the head of the Federal agency concerned out of appropriations available to that agency. Payment of any award, compromise, or settlement in an amount in excess of $2,500 made pursuant to this section or made by the Attorney General in any amount pursuant to section 2677 of this title shall be paid in a manner similar to judgments and compromises in like causes and appropriations or funds available for the payment of such judgments and compromises are hereby made available for the payment of awards, compromises, or settlements under this chapter.

The acceptance by the claimant of any such award, compromise, or settlement shall be final and conclusive on the claimant, and shall constitute a complete release of any claim against the United States and against the employee of the Government whose act or omission gave rise to the claim, by reason of the same subject matter.

(b) Subsection (a) section 2675 of said Title 28 provides that:

An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim

to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within 6 months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section. The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, crossclaim, or counterclaim.

(c) Section 2678 of said Title 28 provides that no attorney shall charge fees in excess of 25 percent of a judgment or settlement after litigation, or over 20 percent of administrative settlements.

(d) Section 2679 of said Title 28 provides that tort remedies against the United States by reason of operation by any Government employee of a motor vehicle while acting within the scope of his employment shall be exclusive of any other action against the employee.

(e) Section 2401(b) of said Title 28 provides that:

A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within 2 years after such claim accrues or unless action is begun within 6 months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

(f) The Tort Claims Act as amended provides that it shall apply to claims accruing 6 months or more after date of enactment (date of enactment, July 18, 1966).

(g) Pursuant to section 2672 as amended, the Attorney General has issued regulations (herein referred to as ''the Regulations''; 28 CFR Part 14) prescribing standards and procedures for settlement of tort claims (31 FR 16616). Persons delegated authority under this part shall follow and be guided by such Regulations (28 CFR Part 14).

[32 FR 3769, Mar. 7, 1967]

§ 2.3 Delegation of authority.

(a) The General Counsel is hereby named as the designee of the Secretary ofCommerce with respect to tort claims filed under section 2672 of Title 28, U.S. Code, as described in § 2.2, with authority to act on such claims as provided in said section 2672, including denial thereof.

(b) Authority delegated under this section may, with the approval of the General Counsel, be redelegated to other designees.

(c) Settlement or denial of any claim under this part is final for the Department of Commerce.

[48 FR 31636, July 11, 1983]

§ 2.4 Procedure for filing claims.

(a) The procedure for filing and the contents of claims shall be pursuant to §§ 14.2, 14.3, and 14.4 of the Regulations (28 CFR Part 14).

(b) Claims shall be filed with the Assistant General Counsel for Administration, Department of Commerce, Washington, D.C. 20230.

(c) If a claim is filed elsewhere in the Department, it shall immediately be recorded and transmitted to the Assistant General Counsel for Administration.

[32 FR 3769, Mar. 7, 1967, as amended at 48 FR 31636, July 11, 1983]

§ 2.5 Adjudication and settlement of claims.

(a) Upon receipt of a claim by the Assistant General Counsel for Administration, the time and date of receipt shall be recorded. The Assistant General Counsel may, after recording the claim, transmit it to the Departmental office or primary operating unit involved in the claim and request that an investigation be conducted. The appropriate Departmental office or primary operating unit shall designate an official to conduct the investigation, who shall prepare a file, obtain additional information as necessary, and prepare for the Assistant General Counsel's signature a proposed award or denial of the claim. If the investigation capabilities of the office or unit are insufficient for a proper and complete investigation, the office or unit shall consult with the Departmental Office of Investigations and Security to: (1) Have that Office conduct the investigation or (2) request another Federal agency to conduct the investigation as necessary, pursuant to § 14.8 of the regulations (28 CFR Part 14), all on a reimbursable basis.

(b) If the amount of the proposed award exceeds $25,000 (in which case, approval by the Attorney General is required), or if consultation with the Department of Justice is desired or required pursuant to §14.6 of the regulations, the Assistant General Counsel for Administration will prepare and compile the material required by the Department of Justice under §14.7 of the Regulations.

(c) Denial of a claim shall be communicated as provided by §14.9 of the regulations (28 CFR Part 14).

(d) Designees hereunder are responsible for the control over and expeditious handling of claims, bearing in mind the applicable statutory time limitations for adjudications of claims.

[32 FR 3769, Mar. 7, 1967, as amended at 48 FR 31636, July 11, 1983]

§2.6 Payment of claims.

When an award is made, the file on the case shall be transmitted to the appropriate fiscal office for payment by the Department or for transmittal for payment as prescribed by §14.10 of the Regulations (28 CFR Part 14). Prior to payment appropriate releases shall be obtained, as provided in said section.

[32 FR 3769, Mar. 7, 1967]

§2.7 Annual report.

The Assistant General Counsel for Administration shall compile an annual report covering the preceding fiscal year, describing actions, including denials, taken under this part, name of claimant, amount claimed, amount of any award, and a brief decription of the claim. The report shall be prepared by November 15 of each year.

[48 FR 31636, July 11, 1983]

§2.8 Supplementary regulations.

(a) The Assistant General Counsel for Administration may from time to time issue such supplementary regulations or instructions as he deems appropriate to carry out the purpose of this part.

(b) Any designee mentioned in paragraph (a) of §2.3 may issue regulations or instructions covering his area of responsibility hereunder which are consistent with this part and with those issued under paragraph (a) of this section, such regulations and instructions to be approved by the Assistant General Counsel for Administration.

[32 FR 3769, Mar. 7, 1967, as amended at 48 FR 31636, July 11, 1983]

PART 3—[RESERVED]

PART 4—PUBLIC INFORMATION

Sec.
4.1 Scope and purpose.
4.2 Policies.
4.3 Definitions.
4.4 Availability of materials for inspection and copying; indexes.
4.5 Requests for records.
4.6 Initial determinations of availability of records.
4.7 Predisclosure notification procedures for confidential commercial information.
4.8 Appeals from initial determinations or untimely delays.
4.9 Fees.
APPENDIX A TO PART 4—DEPARTMENT ADMINISTRATIVE ORDER 205–12—PUBLIC INFORMATION
APPENDIX B TO PART 4—FREEDOM OF INFORMATION PUBLIC FACILITIES AND ADDRESSES FOR REQUESTS FOR RECORDS
APPENDIX C TO PART 4—OFFICIALS AUTHORIZED TO MAKE INITIAL DENIALS OF REQUESTS FOR RECORDS

AUTHORITY: 5 U.S.C. 301, 5 U.S.C. 552, 5 U.S.C. 553, Reorganization Plan No. 5 of 1950; 31 U.S.C. 3717.

SOURCE: 53 FR 6972, Mar. 4, 1988, unless otherwise noted.

§4.1 Scope and purpose.

(a) This part sets forth the rules of the Department of Commerce whereby the Department and its organizational units are to make publicly available the materials and indexes specified in 5 U.S.C. 552(a)(2) and the records requested under 5 U.S.C. 552(a)(3).

(b) These rules conform to requirements of the Freedom of Information Act, 5 U.S.C. 552; as amended, and supplement Department Administrative Order 205–12, which contains policies, delegations of authority, and other criteria implementing 5 U.S.C. 552. DAO 205–12 is attached as Appendix A to this part.

(c) Certain units of the Department other than those identified in §4.4(d) have, pursuant to delegated authority

and for appropriate reasons, established their own facilities for the public inspection and copying of records. The units have provided for separate locations to which requests for records are to be made. These facilities and locations are identified in Appendix B to this part. The units may publish in the FEDERAL REGISTER supplementary rules in addition to but not inconsistent with this part, DAO 205–12, and the rules and regulations contained in their respective chapters of the Code of Federal Regulations or otherwise in the FEDERAL REGISTER. These supplementary rules shall be maintained in the central public reference facility identified in §4.4(c), where information about them may be obtained.

§ 4.2 Policies.

(a) Department Administrative Order 205–12 contains the basic policies and other criteria to be considered in issuing and administering these rules.

(b) Requests for records made under 5 U.S.C. 552(a)(3) apply only to existing records. The Department is not required, in response to a request, to create records by combining or compiling information contained in existing records, to program or reprogram computers, or otherwise to prepare new records. Departmental officials may, upon request, provide or create new information in record form pursuant to user charge statutes, such as 15 U.S.C. 1525–27, or in accord with authority otherwise provided by law.

§ 4.3 Definitions.

(a) All terms used in this part which are defined in 5 U.S.C. 551 shall have the same meaning herein.

(b) As used in this part, *Act* means the ''Freedom of Information Act,'' as amended, 5 U.S.C. 552.

(c) The terms *Office of the Secretary* and *operating unit*, as explained in Department Organization Order 1–1, ''Mission and Organization of the Department of Commerce'' (35 FR 19704, December 27, 1970), are defined as follows:

(1) The ''Office of the Secretary'' is the general management arm of the Department and provides the principal support to the Secretary in formulating policy and in providing advice to the President. It provides program leadership for the Department's functions and exercises general supervision over the operating units. It also directly carries out program functions as may be assigned by the Secretary from time to time, and provides, as determined to be more economical or efficient, administrative and other support services for designated operating units.

(2) An ''operating unit'' is an organizational entity outside the Office of the Secretary charged with carrying out specified substantive functions (i.e. programs) of the Department. The operating units constitute the components of the Department through which most of its substantive functions are carried out.

(d) The term *unit* as used in this part means (1) an operating unit of the Department, and (2) each Secretarial officer and the persons and the Departmental officers reporting to a Secretarial officer.

[53 FR 6972, Mar. 4, 1988; 53 FR 16211, May 5, 1988]

§ 4.4 Availability of materials for inspection and copying; indexes.

(a) The Assistant Secretary for Administration has established and maintains a central public reference facility available to units of the Department, at which place the following materials of those units utilizing the facility shall be made available for public inspection and copying:

(1) Final opinions and orders, including concurring and dissenting opinions, made in the adjudication of cases;

(2) Those statements of policy and interpretations which have been adopted by the participating organizations and are not published in the FEDERAL REGISTER;

(3) Administrative staff manuals and instructions to staff that affect a member of the public;

(4) Current indexes providing identifying information for the public as to any matter which was issued, adopted, or promulgated after July 4, 1967, and is required by 5 U.S.C. 552(a)(2) to be made available or published;

(5) Records of the final votes of each member in every proceeding of an agency comprised of more than one member.

(6) Rules and decisions denying requests for records which otherwise implement or relate to the Act; and

(7) Materials published in the FEDERAL REGISTER pursuant to 5 U.S.C. 552 (a)(1) and such other materials which each unit may consider desirable and practical to make available for the convenience of the public.

(b) The Secretary of Commerce has determined (DAO 205–12, subparagraph 5.02a.5), that it is unnecessary and impracticable to publish quarterly or more frequently and distribute (by sale or otherwise) copies of each index and supplements thereto, as provided in 5 U.S.C. 552(a)(2). Upon request, copies of such indexes shall be provided at a cost not to exceed the direct cost of duplication and mailing, if required.

(c) The central facility established by the Assistant Secretary for Administration is the Central Reference and Records Inspection Facility, Room H6628, Department of Commerce Building, 14th Street between Constitution and Pennsylvania Avenue NW., Washington, DC 20230. The facility is open to the public Monday through Friday of each week, except on official holidays of the Federal Government, between the hours of 9 a.m. and 4:30 p.m. There are no fees or formal requirements for inspection of materials. Equipment for making copies of these materials is available for use by the public. Copies of various Commerce Department materials regularly available for sale by the Department may be purchased at the facility. Information about these materials can also be obtained at this facility. Correspondence concerning materials available at the facility or information about the rules implementing the Act may be sent to the above address. The telephone number of the facility is (202) 377–3271.

(d) The following units of the Department are participating in the use of this central facility: All components of the Office of the Secretary of Commerce.

(e) Other units of the Department which have established separate public reference facilities, listed in Appendix B to this part, may publish rules applicable to the services provided therein for public inspection and copying of materials, provided such rules are not inconsistent with the part.

§4.5 Requests for records.

(a) A request for a record (or information contained therein) of the Department which is not customarily made available to the public as part of the Department's regular informational services or which is not available in a public reference facility described in §4.4(c) or Appendix B to this part, shall be made in writing, with the envelope and the letter clearly marked ''Freedom of Information Request'' to distinguish it from other mail to the Department. Each such request, so marked, shall be addressed to the unit of the Department identified in Appendix B to this part which the requester knows or has reason to believe is responsible for the records requested. If the requester is not sure which is the responsible addressee unit, it shall address the request to the central facility identified in §4.4(c), or obtain advance information from that facility as to which is the responsible addressee unit.

(b) Any request for records which is not marked and addressed as specified in paragraph (a) of this section will be so marked and addressed by Department personnel and forwarded immediately to the responsible unit having possession or control of the records requested or having primary concern with such records. A request which is improperly addressed by the requester will not be deemed to have been ''received'' for purposes of the time period set forth in 5 U.S.C. 552(a)(6), until the earlier of the time that (1) forwarding of the request to the responsible unit has been effected, or (2) such forwarding would have been effected with the exercise of due diligence by Department personnel. In each instance when a request is forwarded, the responsible unit receiving it shall notify the requester that the request was improperly addressed and of the date the request was received by the unit.

(c) Requesters must reasonably describe the records sought. A request for records shall identify the records sufficiently to enable Department personnel familiar with the subject matter to locate them with a reasonable amount

of effort. The requester shall, to the extent possible, furnish specific descriptive information regarding date and place the records were made, the file descriptions, subject matter, persons involved, and other pertinent details that will help identify the records. If the request relates to a matter in pending litigation, the court, location, and case shall be identified. When more than one record is requested, the request shall clearly describe each specific record, and the specific information requested which is contained in the record, so that its availability may be separately determined. When appropriate, the requester shall describe the intended use of the requested records. Employees at a facility or at a specific address listed in Appendix B will assist the public to a reasonable extent in framing a request.

[53 FR 6972, Mar. 4, 1988; 53 FR 16211, May 5, 1988]

§ 4.6 Initial determinations of availability of records.

(a) The responsible unit which receives a request for records shall promptly log the receipt of the request, and within ten days of its receipt (excluding Saturdays, Sundays, and legal public holidays) shall initially determine:

(1) Whether the request is for records under the Act, is for materials available otherwise than under the Act, or is for information not contained in existing records and, therefore, not under the Act. The requester shall be promptly notified in writing how the request is being handled when it does not come within the Act.

(2) Whether the records requested are reasonably described and can be located on the basis of the information supplied by the requester. If any of the records requested cannot be identified and located from the information furnished, the unit shall promptly so inform the requester in writing, specifying what additional identification is needed to assist the unit in locating the record, and offering to assist the requester to reformulate the request.

(3) Whether the records no longer exist, or are not in the unit's possession. The unit should, if it knows which unit of the Department or other agency may have the records, forward the request to it. In each instance, the unit shall promptly notify the requester in writing.

(4) Whether the requested records are the exclusive or primary concern of another executive agency. If so, the unit shall refer the request and the responsive records to that other agency for further action under its rules, and promptly notify the requester in writing of this referral. When the subject matter of a classified record originated by another agency indicates that disclosure of the identity of the orginating agency might itself compromise national security, that agency shall be consulted prior to any referral of the responsive records.

(5) Whether the request is a categorical one. A categorical request, i.e., one for all records falling within a reasonably specific but broad category, shall be regarded as conforming to the statutory requirement that records be reasonably described, if the particular records can be identified, searched for, collected and produced without unduly burdening or disrupting the unit's operations. If the categorical request does not reasonably describe the records requested, the unit shall promptly notify the requester in writing specifying what additional identification is needed, and extend to the requester an opportunity to confer with Department personnel to attempt to reformulate the request so as to reasonably describe the records.

(6) In determining records responsive to a request a unit ordinarily shall include only those records within a unit's possession and control as of the date of its receipt of the request.

(7) In each of the situations set forth in paragraphs (a) and (b) of this section, the procedures relating to fees described in § 4.9 shall be applied and coordinated as appropriate.

(b) An authorized official in the responsible unit shall review the request to determine the availability of the records requested.

(1) The determination shall be made within ten days (excluding Saturdays, Sundays and legal public holidays) of the receipt of the request (as defined in § 4.5(b) of this part), unless the time is

extended as provided in paragraph (b)(2) of this section.

(2) In unusual circumstances, an appropriate official authorized to make initial denials of requests may extend the time for initial determination for up to ten days (excluding Saturdays, Sundays and legal public holidays) by written notice to the requester setting forth the reasons for the extension and the date on which a determination is expected to be sent. Extensions of time for the initial determination and extensions of time on appeal may not exceed a total of ten days, and time taken for the former counts against available appeal extension time. ''Unusual circumstances'' means, but only to the extent reasonably necessary to the processing of a particular request:

(i) The need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(ii) The need to search for, collect, and examine a voluminous amount of separate and distinct records which are the subject of a single request, or

(iii) The need for consultation, which shall be conducted with all practical speed, with another agency or unit having a substantial interest in the determination of the request, or among two or more components of the responsible unit having substantial subject-matter interest in the pertinent documents.

(3) If no determination has been sent to the requester at the end of the initial ten day period, or the last extension date, the requester may consider the request to be initially denied, and exercise a right of appeal of the denial. When no determination can be made within the applicable time period, the responsible unit shall nevertheless exercise due dilligence in continuing to process the request. It shall, on expiration of the applicable time period, inform the requester of the reason for the delay, of the date a determination is expected to be sent, and of the requester's right to treat the delay as a denial and to appeal. It may ask the requester to forego an appeal until a determination is made.

(4) If it is determined that the records requested are to be made available, and there are no further fees to be paid, the responsible official shall promptly notify the requester as to how the disclosable records will be made available. If there are fees still to be paid by the requester, the requester shall be notified that upon payment the records will immediately be made available.

(5) Appendix C lists the limited number of officials who have been authorized to make initial denials of requests for records, except as may be subsequently authorized. A reply initially denying, in whole or in part, a request for records shall be in writing, signed by an authorized official, and it shall include:

(i) A reference to the specific exemptions of the Act authorizing the withholding of the records, stating briefly why the exemption applies and, where relevant why a discretionary release is not appropriate.

(ii) The name and title or position of each official responsible for the denial.

(iii) A statement of the manner in which any reasonably segregable portion of a record shall be provided to the requester after deletion of the portion which is determined to be exempt.

(iv) A brief statement of the right of the requester to appeal the determination to the General Counsel and the address to which the appeal should be sent, in accordance with §4.8 (a) and (b).

(6) A copy of each initial denial and its incoming request for records shall be provided to the Assistant General Counsel for Administration.

[53 FR 6972, Mar. 4, 1988; 53 FR 16057, 16211, May 5, 1988]

§4.7 Predisclosure notification procedures for confidential commercial information.

(a) *General policy*. Confidential commercial or financial information provided to the Department of Commerce by a submitter shall not be disclosed pursuant to a Freedom of Information Act request except in accordance with this section.

(b) *Definitions.* (1) The term ''confidential commercial or financial information'' means records provided to the

Department by a submitter that arguably contain material exempt from release under Exemption 4 of the Freedom of Information Act, 5 U.S.C. 552(b)(4), because disclosure could reasonably be expected to cause substantial competitive harm to the submitter.

(2) The term ''submitter'' means any person or entity who provides confidential commercial or financial information to the Department. The term ''submitter'' includes, but is not limited to corporations, state governments and foreign governments.

(c) *Notice to submitters.* A unit of the Department of Commerce shall provide a submitter with prompt written notice of a request for disclosure of confidential commercial or financial information whenever required under paragraph (d) of this section. Such written notice shall be sent via certified mail, return receipt requested, or any other expeditious manner which provides for documentation of receipt of such notice. The notice shall either describe the exact nature of the information requested or provide copies of the records or portions thereof containing the confidential information.

(d) *When notice is required.* (1) For confidential commercial or financial information submitted to the Department prior to January 1, 1988, the unit shall provide a submitter with notice of a request whenever:

(i) The records are less than ten years old, and the information has been designated by the submitter as confidential commercial or financial information;

(ii) The Department has reason to believe that disclosure of the information could reasonably be expected to cause substantial competitive harm; or

(iii) The information is the subject of a prior express commitment of confidentiality given by the Department to the submitter.

(2) For confidential commercial or financial information submitted to the Department on or after January 1, 1988, the unit shall provide a submitter with notice of a request whenever:

(i) The submitter has in good faith designated the information as confidential commercial or financial information, or

(ii) The unit has reason to believe that disclosure of the information could reasonably be expected to result in substantial competitive harm to the submitter.

(3) When a submitter has designated commercial or financial information as confidential, notice of a FOIA request for such information shall be required for a period of not more than ten years after the date of submission unless the submitter requests, and provides acceptable justification for, a specific notice period of greater duration. Whenever possible, the submitter's claim of confidentiality should be supported by a statement or certification by an officer or authorized representative of the submitter that the information at issue is in fact confidential commercial or financial information which has not been disclosed to the public.

(e) *Opportunity to object to disclosure.* Through the notice described in paragraph (c) of this section, a unit shall afford a submitter 7 working days from date of receipt of such notice within which to provide the unit with a detailed statement of any objection to disclosure. Such statement shall specify all grounds for withholding any of the information and shall demonstrate why the information is considered to be commercial or financial information whose disclosure is likely to cause substantial competitive harm to the submitter. Information provided by a submitter pursuant to this paragraph may itself be subject to disclosure under the FOIA. Whenever notice is given to a submitter under this section the requester shall be advised that the submitter has been provided with notice and an opportunity to object to disclosure.

(f) *Notice of intent to disclose.* A unit shall carefully consider a submitter's objections and specific grounds for nondisclosure prior to determining whether to disclose confidential commercial or financial information. Whenever a unit decides to disclose information over the objection of a submitter, the unit shall forward a written notice to the submitter which includes:

(1) A statement of the reasons why the submitter's objections to disclosure were not sustained;

(2) A description of the information to be disclosed; and

(3) A specified disclosure date. Notice of intent to disclose shall be forwarded to the submitter via certified mail, return receipt requested. Such notice shall state the unit's intent to disclose the information on the expiration of 7 working days from the date of the submitter's receipt of the notice. When notice of intent to disclose is provided to the submitter, the requester shall be advised of such notice and of the specified disclosure date.

(g) *Notice of FOIA lawsuit.* Whenever a requester brings a legal action seeking to compel disclosure of information subject to the notice requirements of paragraph (d) of this section, the unit shall promptly notify the submitter.

(h) *When notice is not required.* The notice requirements of this section shall not apply if:

(1) The Department determines that the information should not be disclosed;

(2) The information has been published or has been officially made available to the public;

(3) Disclosure of the information is required by law (other than 5 U.S.C. 552);

(4) The disclosure is required by an agency rule which: (i) was adopted pursuant to notice and public comment; (ii) specifies narrow classes of records submitted to the agency that are to be released under the Freedom of Information Act; and (iii) provides in exceptional circumstances for notice when the submitter provides written justification, at the time the information is submitted or a reasonable time thereafter, that disclosure of the information could reasonably be expected to cause substantial competitive harm; or

(5) The designation made by the submitter of confidential commercial or financial information appears obviously frivolous, except that the Department must provide the submitter with written notice of any final administrative disclosure determination 7 working days prior to the specified disclosure date.

[53 FR 6972, Mar. 4, 1988; 53 FR 16057, May 5, 1988]

§4.8 Appeals from initial determinations or untimely delays.

(a) When a request for records has been initially denied in whole or in part, or has not been timely determined, or when a requester has received an adverse initial determination regarding any other matter under this regulation, the requester may submit a written appeal within thirty calendar days after the date of the written denial or, if there has been no determination, on the last day of the applicable time limit. The appeal shall include a copy of the original request, the initial denial, if any, and a statement of the reasons why the records requested should be made available and why the initial denial, if any, was in error. No opportunity for personal appearance, oral argument or hearing on appeal is provided.

(b) An appeal shall be addressed to the Assistant General Counsel for Administration, Department of Commerce, Room 5882, 14th and Constitution Avenue NW., Washington, DC 20230. Both the appeal envelope and the letter shall be clearly marked ''Freedom of Information Appeal.'' An appeal not addressed and marked as provided herein will be so marked by Department personnel when it is so identified, and will be forwarded immediately to the Assistant General Counsel for Administration. An appeal incorrectly addressed will not be deemed to have been ''received'' for purposes of the time period for appeal set forth in 5 U.S.C. 552(a)(6), until the earlier of the time that forwarding to the Assistant General Counsel for Administration has been effected; or such forwarding would have been effected with the exercise of due diligence by Department personnel. In each instance when an appeal is so forwarded, the Office of the Assistant General Counsel for Administration shall notify the requester that the appeal was improperly addressed and of the date the appeal was received by the office. All appeals shall be decided by the Assistant General Counsel for Administration with the exception of appeals for records which were initially denied by the Assistant General Counsel for Administration. Appeals initially denied by the Assistant General Counsel for Administration shall

be decided by the General Counsel at the address listed in this paragraph.

(c) The Assistant General Counsel for Administration shall make a determination on an appeal within twenty days (excluding Saturdays, Sundays and legal public holidays) of its receipt, unless an extension of time is taken in unusual circumstances, when the time for action may be extended up to ten days (excluding Saturdays, Sundays and legal public holidays) minus any days of extension granted at the initial request level. A notice of such extension shall be sent to the requester, setting forth the reasons and the date on which a determination of the appeal is expected to be sent. As used in this paragraph, ''unusual circumstances'' are defined in § 4.6(b)(2).

(d) If a decision on appeal is to make the records available to the requester in part or whole, such records shall be promptly made available as provided in § 4.6.

(e) If no determination of an appeal has been sent to the requester within the twenty day period or the last extension thereof, the requester is deemed to have exhausted his administrative remedies with respect to such request, giving rise to a right of judicial review as specified in 5 U.S.C. 552(a)(6)(C). When no determination can be sent to the requester within the time limit, the Assistant General Counsel for Administration shall nonetheless exercise due diligence in continuing to process the appeal. When the time limit expires, the requester shall be informed of the reason for the delay, of the date when a determination may be expected to be made, and of his right to seek judicial review. The requester may be asked to forego judicial review until the appeal is determined.

(f) A determination on appeal shall be in writing and, when it denies records in whole or in part, the notice to the requester shall include:

(1) Identification of the specific exemption or exemptions of the Act authorizing the withholding, a brief explanation of how the exemption applies, and, when relevant, a statement as to why a discretionary release is not appropriate;

(2) A statement that the decision is final for the Department;

(3) Advice that judicial review of the denial is available in the district in which the requester resides or has his principal place of business, the district in which the agency records are located, or the District of Columbia; and

(4) The names and titles or positions of each official responsible for the denial of the appeal.

(g) The Assistant General Counsel for Administration shall send a copy of each determination on appeal to the central public reference facility referred to in § 4.4(c) where it will be indexed and kept available for public inspection and copying.

[53 FR 6972, Mar. 4, 1988; 53 FR 16058, May 5, 1988, as amended at 57 FR 28781, June 29, 1992]

§ 4.9 Fees.

(a) *Definitions.* The following definitions are applicable to this section.

(1) The term ''direct costs'' means those expenditures which an agency actually incurs in searching for and duplicating (and in the case of commercial requesters, reviewing) documents to respond to a FOIA request. Direct costs include, for example, the salary of the employee performing work (the basic rate of pay for the employee plus 16 percent of that rate to cover benefits) and the cost of operating duplicating machinery. Not included in direct costs are overhead expenses such as costs of space, and heating or lighting the facility in which the records are stored.

(2) The term ''search'' includes all time spent looking for material that is responsive to a request, including page-by-page or line-by-line identification of material within documents. Such activity should be distinguished, however, from ''review'' of material in order to determine whether the material is exempt from disclosure (see paragraph (a)(4) of this section). Searches may be done manually or by computer using existing programming.

(3) The term ''duplication'' refers to the process of making a copy of a document necessary to respond to a FOIA request. Such copies can take the form of paper copy, microform, audio-visual materials, or machine readable documentation (e.g., magnetic tape or disk), among others. The copy provided

must be in a form that is reasonably usable by requesters.

(4) The term ''review'' refers to the process of examining documents located in response to a request that is for a commercial use (see paragraph (a)(5) of this section) to determine whether any portion of any document located is permitted to be withheld. It also includes processing any documents for disclosure, e.g., doing all that is necessary to excise them and otherwise prepare them for release. Review does not include time spent resolving general legal or policy issues regarding the application of exemptions.

(5) The term ''commercial use request'' refers to a request from or on behalf of one who seeks information for a use or purpose that furthers the commercial, trade, or profit interests of the requester or the person on whose behalf the request is made. In determining whether a requester properly belongs in this category, the Department must determine the use to which a requester will put the documents requested. Moreover, where the department has reasonable cause to doubt the use to which a requester will put the records sought, or where that use is not clear from the request itself, the Department shall seek additional clarification before assigning the request to a specific category.

(6) The term ''educational institution'' refers to a preschool, a public or private elementary or secondary school, an institution of graduate higher education, an institution of undergraduate higher education, an institution of professional education and an institution of vocational education, which operates a program or programs of scholarly research.

(7) The term ''non-commercial scientific institution'' refers to an institution that is not operated on a ''commercial'' basis as that term is referenced in paragraph (a)(5) of this section, and which is operated solely for the purpose of conducting scientific research the results of which are not intended to promote any particular products or industry.

(8) The term ''representative of the news media'' refers to any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public. The term ''news'' means information that is about current events or that would be of current interest to the public. Examples of news media entities include television or radio stations broadcasting to the public at large, and publishers of periodicals (but only in those instances when they can qualify as disseminators of ''news'') who make their products available for purchase or subscription by the general public. These examples are not intended to be all-inclusive. Moreover, as traditional methods of news delivery evolve (e.g., electronic dissemination of newspapers through telecommunications services), such alternative media would be included in this category. In the case of ''freelance'' journalists, they may be regarded as working for a news organization if they can demonstrate a solid basis for expecting publication through that organization, even though not actually employed by it. A publication contract would be the clearest proof, but the Department may also look to the past publication record of a requester in making this determination.

(b) *Application—Uniform fee schedule.* The fees described in this section apply to FOIA requests processed by all units of the Department. They reflect rates for the full allocable direct cost of search, review, and duplication. The fees to be charged shall be based on the requester category.

(1) The four specific categories and chargeable fees are:

Category	Chargeable service
(i) Commercial Use Requesters.	Search, Review, and Duplication.
(ii) Educational and Non-commercial Scientific Institution Requesters.	Duplication (excluding the cost of the first 100 pages).
(iii) Representatives of the News Media.	Duplication (excluding the cost of the first 100 pages).
(iv) All Other Requesters	Search and Duplication (excluding the cost of the first 2 hours of search and 100 pages).

(2) Uniform fee schedule.

Category	Rate
(i) Manual search	Actual salary rate of employee involved, plus 16 percent of salary rate.
(ii) Computerized search	Actual direct cost, including operator time.
(iii) Duplication of records:.	
(A) Paper copy reproduction	$.07 per page.

Category	Rate
(B) Computer tape or printout reproduction.	Actual cost, including operator time.
(C) Other reproduction (i.e., microfilm, microfiche, microform).	Actual direct cost, including operator time.
(iv) Review of records (includes preparation for release, i.e. excising).	Actual salary rate of employee conducting review, plus 16 percent of salary rate.

(3) *Charging interest.* Interest may be charged to those requesters who fail to pay fees charged in a timely fashion. Assessment of such interest will commence on the 31st day following the day on which the billing was sent. Interest will be charged at the rate specified in section 3717 of title 31 U.S.C. and will accrue from the date of the billing. The Department reserves the right to utilize consumer reporting agencies, and collection agencies, when appropriate, to encourage repayment as authorized by the Debt Collection Act of 1982 (Pub. L. 97–365).

(c) *Waiver or reduction of fees.* (1) Documents shall be furnished without charge, or at reduced charges if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government, and is not primarily in the commercial interest of the requester. To assure that the two basic requirements for waiver are met, Commerce shall rely on the following factors in making a determination on the fee waiver request:

(i) The subject of the request (whether the subject of the requested records concerns the operations or activities of the government);

(ii) The informative value of the information to be disclosed (whether the disclosure is likely to contribute to an understanding of government operations or activities);

(iii) The contribution to an understanding of the subject by the general public likely to result from disclosure (whether disclosure of the requested information will contribute to public understanding);

(iv) The significance of the contribution to public understanding (whether the disclosure is likely to contribute significantly to public understanding of government operations or activities);

(v) The existence and magnitude of a commercial interest (whether the requester has a commercial interest that would be furthered by the requested disclosure);

(vi) The primary interest in disclosure (whether the magnitude of the identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is primarily in the commercial interest of the requester).

(2) Additionally, a fee shall not be charged, or alternatively it may be reduced, in the following instances:

(i) Requests for Department records made by a Federal agency, Federal court (excluding parties), Congressional committee or subcommittee, the General Accounting Office, or the Library of Congress, are not made under the Act, and fees payable under this part do not apply.

(ii) The records are requested by a state or local government, an intergovernmental agency, a foreign government, a public international organization, or an agency thereof, and when it is determined by a responsible Department official that it is an appropriate courtesy, or the records are for purposes that are in the public interest and will promote the objectives of the Act and of the Department.

(iii) A fee shall not be charged if the allowable charges are less than or equal to the cost of routine collection and processing of the fee. Therefore, if the total of charges due for processing a request is $20 or less, no fee will be charged.

(d) *Payment of fees.* The following conditions shall apply to payment of fees charged under this part.

(1) A search fee provided in paragraph (b) of this section is chargeable even when no records responsive to the request are found, or when the records requested are determined by the responsible Department official to be totally exempt from disclosure. If the estimated search or duplication charges exceed $25 the requester shall be notified of the estimated amount of search or duplication fees, unless the requester has previously advised the Department of a willingness to pay an

amount sufficient to cover the estimated fee. Such notice shall offer the requester the opportunity to confer with Department personnel with the object of reformulating the request in order to reduce the cost.

(2) A requester may be required to make an advance payment (i.e., payment before work is commenced or continued on a request) if the estimated or determined allowable charges that a requester may be required to pay will exceed $250 or the requester has previously failed to pay a fee charged in a timely manner (i.e., within 30 days of the date of the billing).

(i) When the estimated charges exceed $250, the Department shall notify the requester of the likely cost and obtain satisfactory assurance of full payment where the requester has a history of prompt payment of FOIA fees. If the requester has no history of prompt payment of FOIA fees, the Department shall require an advance payment of an amount up to the full estimated charges.

(ii) If a requester has previously failed to pay a fee charged in a timely manner, the Department shall require the requester to pay the full amount owed plus any applicable interest and to make an advance payment of the full amount of the estimated fee before the Department will process the request.

(3) Whenever the Department acts pursuant to paragraph (d)(2) of this section, the administrative time limits prescribed in 5 U.S.C. 552(a)(6) will begin only after the agency has received payment of the required fee.

(4) Upon the completion of processing of a request, when a specific fee is determined to be payable and appropriate notice has been given to the requester, the payment of such fee shall be received before the requested records or a portion of the records are made available to the requester.

(5) Payment of fees shall be made in cash or preferably by check or money order payable to ''Treasury of the United States'', and they shall be paid or sent to the unit stated in the billing notice or, if none, to the unit handling the request. Where appropriate, the responsible official may require that payment be made in the form of a certified check.

(6) If an advance payment of an estimated fee exceeds the actual total fee by $1 or more, the difference shall be refunded to the requester.

(7) When the responsible official reasonably believes that a requester or group of requesters acting in concert is attempting to break a request into a series of requests for the purpose of evading the assessment of fees, the unit may aggregate any such requests and charge accordingly.

(e) *Other charges.* (1) This part does not apply to any special statistical compilation, study, or other record requested pursuant to statutes specifically providing for setting the level of fees for particular types of records such as 15 U.S.C. 1525–1527. The fee for the performance of such service is the actual cost of the work involved in compiling the record. All monies received by the Department in payment of the cost of this work are deposited in a separate account administered under the direction of the Secretary, and may be used to defray the ordinary expenses incidental to the work.

(2) The full cost of other special services will be assessed. Such services would include:

(i) Certifying that records are true copies; and

(ii) Sending records by special methods such as express mail, etc.

[53 FR 6972, Mar. 4, 1988; 53 FR 16058, 16211, May 5, 1988]

APPENDIX A TO PART 4—DEPARTMENT ADMINISTRATIVE ORDER 205–12—PUBLIC INFORMATION

SECTION 1. *Purpose*—.01 This order, and the rules and other materials which implement it, are designed to carry out the responsibilities of the Department of Commerce under the Freedom of Information Act, as amended (5 U.S.C. 552), hereinafter referred to as ''the Act.''

02. This revision updates and clarifies the provisions of the order (dated June 29, 1967) which it supersedes, in light of the amendments to the Act which become effective February 19, 1975. Section 7, ''Compulsory Process Requesting Documents or Testimony'' contained in the superseded order, is now found in Department Administrative Order 218–5, to be published separately in the FEDERAL REGISTER.

SEC. 2 *Authorities*—This order is issued pursuant to the Act: 5 U.S.C. 553; 5 U.S.C. 301; Reorganization Plan No. 5 of 1950; and other authority vested by law in the Secretary applicable to the dissemination of records and other information of the Department and charges for services related thereto.

SEC. 3. *Policies*—.01 The Department of Commerce, in fulfilling its statutory missions to foster, promote and develop the foreign and domestic commerce of the United States and to administer the specific programs entrusted to it, regularly develops, collects, analyzes, and disseminates facts, statistics, consensus, charts, scientific findings, technology, and other information, and performs other services, in order to assist the business community and other segments of the public, according to their needs and interest. This information which the Department develops, collates, and disseminates is generally made readily available, either without charge or by purchase, to the affected persons and to anyone else who may be interested, through publications, reprints of regulations (by subscription or otherwise), press releases, special reports, correspondence and personal interviews or conferences with staff, speeches, and other media. It is the policy of the Department to continue its regular practices of disseminating information to the public prepared as a part of its program responsibilities, to the fullest extent legally permissible and economically feasible, and to continue to handle public requests for such information (which may include records) in the usual manner through its regular facilities and channels, as distinguished from those requests for records subject to 5 U.S.C. 552(a)(3) which are to be made and handled in accord with the rules established in and pursuant to subsections 5.03 and 5.04 of this order.

In carrying out this policy, the officials designated in subsection 4.01 of this order shall: (a) Establish and continue an effective program of communicating to the public the useful information obtained or developed in the fulfillment of their organizational missions; (b) publicize the availability of such informational materials in their rules or by other practical means so that the public shall utilize the regular informational programs of the Department, rather than resorting to the formal procedures for requesting records established pursuant to 5 U.S.C. 552(a)(3); and (c) insure that any such information which is given to individuals or special groups shall also be made available to the general public in accord with subsections 5.01 and 5.02 of this order, when and to the extent such information is subject to publication or inspection under 5 U.S.C. 552(a)(1), (2), or (5).

.02 Officials responsible for determining, in accord with the Act and this order:

(a) What materials are to be published in the FEDERAL REGISTER; (b) What and how materials are to be made available for public inspection and copying, including indexing; and (c) What and how records which are requested are to be made available; shall, where discretion exists in making such determinations, take an affirmative and constructive view of the requirements of the Act. Accordingly, in making rules and specific determinations, they shall among other factors: (1) Provide such information to the affected public as well as enable it to deal effectively and knowledgeably with their organizations; (2) keep within the limits of demonstrable need the use of the legal authorities which permit the withholding of information and records; (3) apply principles of equal treatment to requests for records; (4) consider disclosure to be the rule rather than the exception; (5) consider the public convenience as well as the efficient conduct of their organizations' business; (6) act in a timely manner; and (7) be guided by materials prepared by the Department of Justice and the Office of General Counsel of the Department, and by applicable court decisions.

SEC. 4. *Delegation of authority*—.01 The Secretary of Commerce is responsible for the effective administration of the Act and other laws applicable to the dissemination of records and other information of the Department. Aside from the Secretary's retaining authority for his immediate office, or as he otherwise may act, authority is hereby delegated to the following officials of the Department to decide initially whether or not to make publicly available records and other information subject to the Act which are in the possession of their organizations, in accord with the provisions of the Act, this order and rules supplementing it, other applicable law, and as may be otherwise provided by the Secretary:

a. Secretarial Officers, for their respective offices and for the Department staff units reporting to them (as defined in Department Organization Order 1–1, ''Mission and Organization of the Department of Commerce'' (35 FR 19704, December 27, 1970)), as amended.

b. Heads of operating units of the Department (as defined in Department Organization Order 1–1).

.02 Although the officials having authority under subsection 4.01 of this section may permit employees within their organizations to make records and information publicly available under the Act, they shall redelegate authority initially to deny such records and information only to a limited number of officers or employees under them without power of further redelegation.

.03 The authority to make final decisions on appeal of initially denied requests for records is hereby delegated to the General Counsel of the Department without power of further redelegation.

.04 The General Counsel of the Department, and his designees, shall provide legal services to enable the officials designated in subsections 4.01 and 4.02 of this section to discharge their respective duties and responsibilities under and pursuant to this order, and shall make legal interpretations of questions arising thereunder. The General Counsel shall also act as the focal point within the Department for consultation or other communication with the Department of Justice with respect to any actions to be taken in connection with the Act, this order, and rules implementing it.

.05 Program officials shall provide all support and assistance necessary to enable the General Counsel to perform the functions delegated in this order. This shall include (i) keeping the Office of the General Counsel informed of Freedom of Information Act requests received by the unit; (ii) providing prompt responses to Office of the General Counsel instructions, or requests for assistance; (iii) as requested, allowing the Office of the General Counsel access to relevant records; and (iv) promptly consulting with the Office of the General Counsel regarding any legal issues which arise during the processing of a request.

b. The Office of the Inspector General shall comply with the provisions of this order except that the Office of the Inspector General need not allow the Office of the General Counsel access to records to the extent that (i) information contained therein might reveal the identity of a confidential source, or (ii) the Inspector General determines that disclosure to Office of the General Counsel would interfere with an audit, investigation, or prosecution.

SEC. 5. *Functions and responsibilities*—.01 *Publication in the* FEDERAL REGISTER (5 U.S.C. 552(a)(1) of the Act).

a. The following information of the Department and its component organizations shall be separately stated and currently published in the FEDERAL REGISTER for the guidance of the public.

1. Descriptions of the central and field organizations and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may secure information, make submittals or request, or obtain decisions;

2. Statements of the general course and method by which functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

3. Rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

4. Substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by their agencies; and

5. Each amendment, revision, or repeal of the foregoing.

b. The information contained in paragraph 5.01a of this subsection shall be published in the FEDERAL REGISTER in the form of or included in:

1. Department Organization Orders, including any supplements and appendices thereto. The Assistant Secretary for Administration shall cause such materials to be published in the FEDERAL REGISTER. The Department Organization Orders and their supplements and appendices contain, among other information, the descriptions of the various organizations, the descriptions of the various organizations of the Department, and in many instances the other information indicated in subparagraphs 5.01a.1 and 2. of this subsection.

2. Department Administrative Orders, including any supplements or appendices thereto.

3. Other Office of the Secretary or operating unit directives.

4. Rules and orders contained in the various Titles of the Code of Federal Regulations assigned to the Office of the Secretary and to the operating units of the Department.

5. General notices.

6. Other forms of publications when incorporated by reference in the Federal Register with the approval of the Director of the Federal Register.

c. Officials responsible for determning what materials are to be submitted for publication in the FEDERAL REGISTER pursuant to 5 U.S.C. 552(a)(1) shall consider, among other factors, in making such determinations:

1. That those matters which fall within one or more of the exemptions contained in 5 U.S.C. 552(b) need not be published. However, it may be decided, in accord with subsection 3.02 of this order, that publication even of such matters should in some instances and respects be made.

2. That matters which are reasonably available to the class of persons affected thereby and which have been or are to be incorporated by reference in the FEDERAL REGISTER with the approval of the Director of the Federal Register are deemed to be published in the FEDERAL REGISTER. In such cases, the standards and procedures for incorporation by reference established by the Director of the Federal Register (See 1 CFR Part 51; 37 FR 23614, November 4, 1972) shall be followed.

3. That matters to which members of the public do not have to resort or by which they are not to be adversely affected, or which do not impose burdens, obligations, conditions, or limitations upon persons affected, need not be published in the FEDERAL REGISTER

under 5 U.S.C. 552(a)(1). However, the policy considerations expressed in subsection 3.02 of this order may in certain instances suggest the publication of such matters.

4. That no person shall in any manner be required to resort to or be adversely affected by any matter required to be published in the FEDERAL REGISTER under 5 U.S.C. 552(a)(1) when it is not so published. However, actual and timely notice given to such a person having such actual notice is equally bound as one having constructive notice by FEDERAL REGISTER publication. Nevertheless, such actual notice should as a matter of policy be in addition to, rather than instead of, publication.

5. That ''currently publish'' as provided in 5 U.S.C. 552(a)(1) means promptly at the time that the action occurs.

.02 Availability of materials for inspection and copying; indexing (5 U.S.C. 552(a)(2) and (5) of the Act).

a. The head of each operating unit of the Department shall for his unit, and the Assistant Secretary for Administration shall for the officials, officers and units referred to in paragraph 4.01a. of this order, in accordance with rules which they shall cause to be published in the FEDERAL REGISTER, make available for public inspection and copying the following materials, unless such materials are promptly published and copies offered for sale:

1. Final opinion (including concurring and dissenting opinions), as well as orders, made in the adjudication of cases.

2.. Those statements of policy and interpretations which have been adopted by the agency and are not published in the FEDERAL REGISTER.

3. Administrative staff manuals and instructions to staff that affect a member of the public.

4. Where applicable, a record of the final votes of each member of an agency in every proceeding when the agency has more than one number. (The terms ''agency proceeding'' and ''agency'' are defined in 5 U.S.C. 551, as amended by 5 U.S.C. 552(e).

5. An index, currently maintained, which provides identifying information for the public as to any matter (a) which has been issued, adopted, or promulgated since July 4, 1967, and (b) which is required to be made available or published pursuant to 5 U.S.C. 552(a)(2). It is hereby determined, subject to subsequent redetermination by the Assistant Secretary for Administration pursuant to changed circumstances, that it is unnecessary and impracticable to publish quarterly or more frequently and distribute (by sale or otherwise) copies of each such index and supplements thereto. Copies of such indexes shall be provided upon request at a cost not to exceed the direct cost of duplication.

b. The rules published in the FEDERAL REGISTER under paragraph 5.02a of this subsection shall include provisions for the time, place, copying fees, and any procedures applicable to making such materials available at facilities or otherwise for public inspection and copying.

c. The Assistant Secretary for Administration shall establish and maintain a centralized public reference facility for the inspection and copying of materials subject to 5 U.S.C. 552(a)(2) and (5). The head of an operating unit may, with the approval of the Assistant Secretary for Administration, establish for this organization a separate place for making the materials subject to 5 U.S.C. 552(a)(2) and (5) available to the public for inspection and copying, and publish appropriate rules applicable thereto approved by the Assistant Secretary for Administration.

d. The officials responsible for determining the materials to be available for public inspection and copying under paragraph 5.02a of this subsection shall consider, among other factors, in promulgating the published rules or in making such determinations:

1. That those matters which fall within one or more of the exemptions contained in 5 U.S.C 552(b) are not required to be made available. Nonetheless, they may be made available in any particular respect if it is determined that this would better serve the public interest.

2. That they may, to the extent required to prevent a clearly unwarranted invasion of personal privacy, delete identifying details from an opinion, statement of policy, interpretation, staff manual or instruction, or other materials, when it is made available or published. However, in each case the justification for the deletion shall be explained fully in writing. Such action is to be taken in order to provide the public with those information materials called for under 5 U.S.C. 552(a)(2), while at the same time protecting the medical, family or other personal privacy rights of the individuals involved in such agency materials. Agency explanations for deletions of identifying details should provide such information as can be furnished without defeating the purpose of the deletion provision. When an agency has a number of recurring deletion situations, it may in its implementing rules or other public notice specify the applicable reasons for such deletions, and cite the rule in the preamble to each of the covered documents, rather than contain the complete explanation in each document.

3. That distinction should be made between those materials (a) which do and which do not affect any member of the public, and (b) which are and which are not to be relied upon, used or cited as precedent by the agency against any private person or party. Those materials specified in 5 U.S.C. 552(a)(2) which affect the public and which have precedential effect shall be made available for inspection and copying, and also included in

the index, as provided in this order, However, since the basic purpose of this section of the Act is to disclose to the interested members of the public essential information which will enable them to deal effectively and knowingly with an agency, materials which provide such information should be included in the appropriate facilities.

4. That an advisory interpretation made by an agency on a specific set of facts which is requested by and addressed to a particular person need not be made generally available under paragraph 5.02a. of this subsection if it is not to be cited or relied upon by any official of the agency as a precedent in the disposition of other cases. Nonetheless, if it may serve any useful public purpose, any such interpretation may be made publicly available upon the deletion of identifying details to the extent necessary to protect personal privacy.

5. That the agency is not precluded using as precedent against any affected person those matters specified in subparagraphs 1.3. of paragraph 5.02a of this subsection as to which a person has actual and timely notice of the terms thereof, even though they have not been indexed and either made available or published. If the agency practice is to furnish such notices, it is more desirable that it do so in addition to, rather than instead of, indexing and making them publicly available hereunder, in recognition of the purpose of 5 U.S.C. 552(a)(2) to make the end product materials of the administrative process available to the public.

6. That matters which are published in the FEDERAL REGISTER in accordance with 5 U.S.C. 552(a)(1) are not required to be made available under 5 U.S.C. 552(a)(2) for public inspection and copying nor need they be indexed (the Federal Register has its own index). However, to the extent that it would be useful and practicable to index and provide such published information to the public for ready reference, it should be included.

7. That an index provides sufficient identifying information for the public if a person who exercises diligence may familiarize himself with the materials through use of the index.

8. That an alternative to making materials available to the public for inspection and copying is to promptly publish and offer them for sale to the public. Such published materials, however, are subject to the indexing requirement. If it would help the public and it is practical to do so, a copy of such published materials should also be made available in any facilities established for public inspection, and if permissible, copies of the publications should be made available for sale therein.

9. That materials required to be made available or published under 5 U.S.C. 552(a)(2), but which were adopted or issued by an agency prior to July 4, 1967, may at any time be used, relied upon or cited as precedent by the agency irrespective of whether they are listed in the agency's index. Officials, however, may, to the extent they deem it practicable and helpful to the public, also index such materials in whole or in part.

03. *Availability of records upon request* (5 U.S.C. 552(a) (3), (4), and (6) of the Act).

a. The Assistant Secretary for Administration shall cause to be published in the FEDERAL REGISTER rules stating the time, place, fees and procedures to be followed, with respect to making records of the Department promptly available to any person requesting them, as provided in 5 U.S.C. 552(a) (3), (4) and (6).

b. The rules published in the FEDERAL REGISTER pursuant to paragraph 5.03a. of this subsection shall, insofar as is practicable, be complete, precise, and workable, suitable for the information of agency personnel and the public alike, and shall include provisions, among other matters, for the following:

1. Information as to the place to make requests, when requests will be deemed received by the Department for purposes of the time limits contained in 5 U.S.C. 552(a)(6), the timely handling of requests, and the making of initial determinations concerning the availability of the records requested.

2. Timely notice to the requester, as applicable, that a requested record does not exist, has been disposed of as provided by law, or is not in the possession or control of the Department.

3. A procedure whereby the time limits for responding to requests for records or appeals from denials may be extended, as authorized by 5 U.S.C. 552(a)(6)(B), and wherein a failure of the agency to respond in a timely manner may be considered a denial of the request.

4. Consultation with other operating units or offices within the Department, or with other Federal executive agencies, when there is a mutual agency interest or concern in the record or its contents and there is a question as to its availability. The determination as to availability should be made by the predominantly interested agency, if there is one. When a record requested from the Department is the exclusive concern of another executive agency, the request shall be promptly referred to that other agency, and the requester so notified.

5. A procedure for administrative appeal of a request for a record initially denied in whole or in part. The appeal procedure shall include provisions which insure that: (i) The requester may file an appeal, in writing, within thirty days of receipt of an initial denial; (ii) an appeal shall be considered received when properly addressed to the General Counsel: (iii) appeals shall be decided without right of the requester for a personal appearance, oral argument, or hearing; (iv) timely decisions on appeals or other notices concerning them shall be made in writing,

and communicated to the requester; (v) if the decision is wholly or partly in favor of the requester, the General Counsel shall make the particular records of information available to the requester or order that such be done; and to the extent that the decision is adverse to the requester, it shall briefly state the reason for the decision and the identity of the official responsible for making it, (vi) whenever applicable, requesters shall be effectively notified of their right to seek judicial review.

6. A schedule of fees as authorized by the Act, with procedures which (i) put requesters of records on timely notice as to substantial search and copying fees estimated to be incurred with respect to a request; (ii) attempt to insure that requester pay the chargeable fees for work to be done; (iii) which provide for appropriate waiver or reduction of fees; and (iv) which do not intend to discourage requests for records under the Act. Work, services, publications, or documents which the agency as part of its regular mission has been performing or producing or will be performed or produced for members of the public or for those who are engaged in the transaction of official business of or with the Government, without charge, by user charge, or by publication or subscription charge, are to be distinguished from those records properly requested under 5 U.S.C. 552(a)(3) and the fees charged thereunder.

c. The officials designated in subsections 4.01 and 4.02 of this order who are responsible for initially determining whether any records properly requested under the Act may be made available, shall include in their consideration:

1. Whether the records are of the type referred to in subsection 3.01 of this order, and the request is to be handled in accord with the policy set forth therein;

2. Whether the records are subject to 5 U.S.C. 552(a) (1), (2), or (5) and have been otherwise made publicly available pursuant to paragraphs 5.01a or 5.02a of this section;

3. Whether the requester has complied with the published rules covering the making of requests and the payment of fees;

4. Whether the records or information contained in them are matters which fall within one or more of the exemptions contained in 5 U.S.C. 552(b), and if so whether they are not to be disclosed or whether, if such discretion exists, it would nevertheless be in the public interest to make the record or information available in whole or in part;

5. Whether any reasonably segregable portion of the record can be disclosed after deletion of the portions which it is determined should not be disclosed.

d. The officials who establish a facility as provided in paragraph 5.02 of this section may utilize the facility to:

1. Receive and assist in processing requests for records;

2. Receive from officials the requested records which are made available, maintain custody of them and supervise their inspection and copying by requesters;

3. Arrange for making certified and other copies of available records;

4. Collect and account for fees established for services connected with the requests;

5. Return records after inspection to their place of custody;

6. Act as a central communication center between the requesters and the organizations involved in recordkeeping and officials making determinations as to their availability; and

7. Provide reasonable assistance to persons requesting records, including explanations of the applicable procedure and other rules, and making referrals to sources of information available under regular informational programs of the Department.

e. The Assistant Secretary for Administration shall establish such standard forms, procedures and instructions as he deems necessary for processing requests for records, maintaining records of related expenditures, and obtaining information for the Departmental report required by 5 U.S.C. 552(d).

04. *Special review requirements.*—a. The General Counsel or one of his designees shall be consulted before any initial denial is issued.

b. As provided in paragraph 7.03c. of DAO 205–12, the Operating Unit Public Affairs Office shall receive a copy of each request at the same time as the Action Office. If the Public Affairs Officer wishes to monitor and/or comment on any response to a particular request prior to transmittal, the Officer shall notify the Action Office within three (3) working days after receiving a copy of the request. The Action Office shall cooperate with the Public Affairs Officer in this effort; and give due consideration to any recommendations or comments from the Officer. In addition, the Director of the Office of Public Affairs or his or her designee shall be informed before any decision on an appeal from an initial denial is issued.

c. As provided in Part B, Chaper IV, subsection 5.06f. of the Department's Handbook of Security Regulations and Procedures, appeals of initial denials based, even in part, on the ground that the matter is exempted from disclosure under 5 U.S.C. 552(b)(1) (classified information) shall be referred to the Departmental Information Security Program Committee. That Committee shall conduct a declassification review and determine if the record(s) involved may be made available to the public.

d. Whenever, on appeal from an initially denied request, the General Counsel and the concerned Secretarial Officer or operating unit head cannot agree on whether applicable exemptions should be waived, as provided

in subsection 03c.4. of this section, the matter shall be promptly referred to the Secretary for resolution.

.05 *Annual Report* (5 U.S.C. 552(d) of the Act).

a. The Assistant Secretary for Administration shall prepare and transmit to the Congress on or before March 1 of each year the annual report by the Act.

b. To assist in the preparation of the report, each official specified in subsection 4.01 of this order, shall, no later than January 31 of each year, provide the Assistant Secretary for Administration with the information specified in the Act and such other information as he may require.

SEC. 6. *Supplementary rules*—.01 The Secretary may from time to time issue such supplementary rules or instructions as he deems appropriate to carry out the purposes of this order.

.02 Each duly authorized official may issue rules covering his respective area of responsibility designed to implement this order, and which are consistent herewith and with any rules issued by the Assistant Secretary for Administration.

SEC. 7. *Effect on other orders.* This order supersedes Department Administrative Order 205–12 of June 29, 1967, as amended. Any other prior orders, rules, or instructions, or parts thereof, the provisions of which are inconsistent or in conflict with the provisions of this order, are hereby constructively amended or superseded.

APPENDIX B TO PART 4—FREEDOM OF INFORMATION PUBLIC FACILITIES AND ADDRESSES FOR REQUESTS FOR RECORDS

The following public reference facilities have been established within the Department of Commerce for: (a) Public inspection and copying of materials from various units within the Department under 5 U.S.C. 552(a)(2), or determined to be available for response to requests made under 5 U.S.C.(a)(3); (b) furnishing information and otherwise assisting the public concerning Departmental operations under the Freedom of Information Act; and (c) receipt and processing requests for records under 5 U.S.C. 552(a)(3).

Commerce units that have separate mailing addresses are noted below. Requests should be addressed to the unit which the requester knows or has reason to believe has possession, control, or has primary concern with the records sought. Otherwise, requests should be addressed to the Central Reference and Records Inspection Facility.

Department of Commerce Freedom of Information Central Reference and Records Inspection Facility, U.S. Department of Commerce, room 6020, Herbert C. Hoover Building, 14th Street between Constitution Avenue and Pennsylvania, NW., Washington, DC 20230. Phone (202) 377–4115. This facility serves the Office of the Secretary and all other units of the Department not identified below as explained at 15 CFR 4.4(c) and (d). Bureau of the Census, Chief, Program and Policy Development Office, U.S. Department of Commerce, room 2430, Federal Building 3, Washington, DC 20233. Phone (301) 763–2758.

The Bureau of the Census maintains a separate facility for inspection of (a)(2) records. The location is room 2455, Federal Building 3, Suitland, Maryland 20233.

Bureau of Economic Analysis, Public Reference Facility, U.S. Department of Commerce, room 1115, Tower Building, 1401 K Street, NW., Washington, DC.

Mailing address: Freedom of Information Control Desk, Office of Administration, Office of Economic and Statistical Affairs, U.S. Department of Commerce, room 4838, Herbert C. Hoover Building, 14th Street and Constitution Avenue, NW., Washington, DC 20230. Phone 377–3308.

Economic Development Administration, Freedom of Information Records Inspection Facility, U.S. Department of Commerce, room 7001, Herbert C. Hoover Building, 14th Street and Constitution Avenue, NW., Washington, DC 20230. Phone (202) 377–4687. Mailing address of Regional EDA offices:

—Philadelphia Regional Office, EDA, U.S. Department of Commerce, Freedom of Information Request Control Desk, Liberty Square Building; First floor, 105 South 7th Street, Philadelphia, Pennsylvania 19106.

—Atlanta Regional Office, EDA, U.S. Department of Commerce, Freedom of Information Request Control Desk, suite 1820, 401 West Peachtree Street, NW., Atlanta, Georgia 30308–3510.

—Denver Regional Office, EDA, U.S. Department of Commerce, Freedom of Information Request Control Desk, room 670, 1244 Speer Boulevard, Denver, Colorado 80204.

—Chicago Regional Office, EDA, U.S. Department of Commerce, Freedom of Information Request Control Desk, 175 West Jackson Boulevard, suite A–1630, Chicago, Illinois 60604.

—Seattle Regional Office, EDA, U.S. Department of Commerce, Freedom of Information Request Control Desk, Jackson Federal Building, room 1856, 915 Second Avenue, Seattle, Washington 98174.

—Austin Regional Office, EDA, U.S. Department of Commerce, Freedom of Information Request Control Desk, Grant Building, suite 201, 611 East 6th Street, Austin, Texas 78701.

Bureau of Export Administration, Freedom of Information Records Inspection Facility, U.S. Department of Commerce, room 4525, Herbert C. Hoover Building, 14th Street and Constitution Avenue, NW., Washington, DC 20230. Phone (202) 377–5653.

International Trade Administration, Freedom of Information Records Inspection Facility, U.S. Department of Commerce, room 4102, Herbert C. Hoover Building, 14th Street and Constitution Avenue, NW., Washington, DC 20230. Phone (202) 377–3031.

Minority Business Development Agency, Freedom of Information Office, U.S. Department of Commerce, room 5073, Herbert C. Hoover Building, 14th Street and Constitution Avenue, NW., Washington, DC 20230. Phone (202) 377–2881.

The Minority Business Development Agency maintains a separate facility for public inspection of (a)(2) records. The location is room 5078B, Herbert C. Hoover Building, Washington, DC 20230.

National Institute of Standards and Technology, Freedom of Information Records Inspection Facility, room E106, Administration Building, Gaithersburg, Maryland 20234. Phone (301) 975–2389.

Mailing address: National Institute of Standards and Technology, Freedom of Information Request Control Desk, U.S. Department of Commerce, room A–1105, Gaithersburg, Maryland 20234.

National Oceanic and Atmospheric Administration, Public Reference Facility, room 714 WSC–5, 6010 Executive Boulevard, Rockville, Maryland 20852. Phone (301) 443–8967.

National Technical Information Service, Freedom of Information Records Inspection Facility, room 209, Forbes Building, 5285 Port Royal Road, Springfield, Virginia 22161. Phone (703) 487–4670.

National Telecommunications and Information Administration, Freedom of Information Request Control Desk, U.S. Department of Commerce, room 4717, Herbert C. Hoover Building, 14th Street and Constitution Avenue, NW., Washington, DC 20504. Phone (202) 377–1816.

Patent and Trademark Office, Freedom of Information Records Inspection Facility, Public Search Room, room 1A01, Crystal Plaza 3, Arlington, Virginia 20231. Mailing address: Patent and Trademark Office, Freedom of Information Request Control Desk, Box 8, Washington, DC 20231. Phone (703) 557–4035.

United States Travel and Tourism Administration, Freedom of Information Request Control Desk, U.S. Department of Commerce, room 1524, Herbert C. Hoover Building, 14th Street and Constitution Avenue, NW., Washington, DC 20230. Phone (202) 377–3812.

[56 FR 20533, May 6, 1991]

APPENDIX C TO PART 4—OFFICIALS AUTHORIZED TO MAKE INITIAL DENIALS OF REQUESTS FOR RECORDS

The following officials of the Department have been delegated authority to initially deny requests for records of their respective units for which they are responsible. (The listings are subject to change because of organizational changes or new delegations.)

Accordingly, the Director for Federal Assistance and Management Support is specifically authorized to amend or revise this appendix from time to time in order to reflect changes.

OFFICE OF THE SECRETARY

Executive Secretariat, Director.

Office of the Deputy Secretary: Associate Deputy Secretary.

Office of Business Liaison: Director.

Office of Consumer Affairs: Director.

Office of Space Commerce: Director.

Office of the Assistant Secretary for Legislative and Intergovernmental Affairs: Deputy Assistant Secretary for Legislative and Intergovernmental Affairs.

Office of the Inspector General: Counsel to the Inspector General. Deputy Counsel to the Inspector General.

Office of the General Counsel: Deputy General Counsel. Assistant General Counsel for Administration. Director of Intelligence Liaison.

Assistant Secretary for Administration

Office of the Administrative Law Judge: Office Manager.

Office of Civil Rights: Director.

Office of Financial Management: Director.

Office of Federal Assistance and Management Support: Director.

Office of Federal Assistance: Director.

Office of Budget Operations: Director.

Office of Management Support: Director.

Departmental Freedom of Information Officer

Office of Budget, Planning and Organization: Director.

Office of Management and Organization: Director.

Office of Budget: Director.

Office of Program Planning and Evaluation: Director.

Office of Personnel: Director.

Office of Personnel Operations: Director.

Office of Information Resources Management: Director.

Office of Procurement and Administrative Services: Director.

Office of Administrative Services Management: Director.

Office of Federal Property Programs: Director.

Office of Publications: Director.

Office of Security: Director.

Office of Procurement: Director.

Office of Major Systems Procurement: Director.

Office of Procurement Operations: Director.

Office of Procurement Management: Director.
Office of Small and Disadvantaged Business Utilization: Director.

ECONOMIC AND STATISTICAL AFFAIRS

Office of Administration: Director.
Bureau of Economic Analysis: Director.
Bureau of the Census: Chief, Program and Policy Development Office.

TECHNOLOGY ADMINISTRATION

Under Secretary for Technology: Deputy Under Secretary for Technology. Assistant Secretary for Technology Policy. Chief Counsel. Deputy Chief Counsel.
National Institute of Standards and Technology: Director of Administration. Deputy Director of Administration.
National Technical Information Service: Director. Associate Director for Administration.

ECONOMIC DEVELOPMENT ADMINISTRATION

Chief Counsel.
Deputy Chief Counsel.

EXPORT ADMINISTRATION

Under Secretary.
Deputy Under Secretary.
Director for Administration
Assistant Secretary for Export Administration.
Director, Office of Technology and Policy Analysis.
Director, Office of Foreign Availability.
Director, Office of Export Licensing.
Deputy Assistant Secretary for Industrial Resource Administration.
Assistant Secretary for Export Enforcement.
Director, Office of Export Enforcement.
Director, Office of Antiboycott Compliance.
Director, Office of Enforcement Support.

INTERNATIONAL TRADE ADMINISTRATION

Deputy Under Secretary for International Trade

Deputy Assistant Secretary for Planning
Director, Office of Public Affairs
Director, Office of Legislative and Intergovernmental Affairs

International Economic Policy

Director, Office of Policy Coordination
Director, Office of Multilateral Affairs
Director, Office of Africa
Director, Office of the Near East
Director, Office of South Asia
Director, Office of Western Europe
Director, Office of European Community Affairs
Director, Office of Eastern Europe, Russia and Independent States
Director, Office of Latin America
Director, Office of Mexico
Director, Office of Canada
Director, Office of the PRC and Hong Kong
Director, Office of the Pacific Basin
Director, Office of Japan Trade Policy
Director, Office of Japan Commercial Programs

Import Administration

Director, Foreign Trade Zones Staff
Director, Office of Policy
Director, Statutory Import Programs Staff
Director, Office of Antidumping Compliance
Director, Office of Countervailing Compliance
Director, Office of Countervailing Agreements Compliance
Director, Office of Antidumping Investigations
Director, Office of Countervailing Investigations
Director, Office of Accounting

Trade Development

Director, Office of Trade and Economic Analysis
Director, Office of Export Promotion Coordination
Director, Office of Planning, Coordination and Resource Management
Director, Office of Aerospace
Director, Office of Computers and Business Equipment
Director, Office of Microelectronics, Medical Equipment and Instrumentation
Director, Office of Telecommunications
Director, Office of Automotive Affairs
Director, Office of Materials, Machinery and Chemicals
Director, Office of Energy, Environment and Infrastructure
Director, Office of Textiles and Apparel
Director, Office of Consumer Goods
Director, Office of Export Trading Company Affairs
Director, Office of Finance
Director, Office of Service Industries

U.S. and Foreign Commercial Service

Director, Office of Information Systems
Deputy Assistant Secretary for International Operations
Deputy Assistant Secretary for Domestic Operations
Director, Planning and Resource Management Staff
Manager, Export Promotion Services

Administration

Director, Office of Organization and Management Support
Director, Office of Personnel
Director, Office of Financial Management
Director, Office of Information Resources Management

MINORITY BUSINESS DEVELOPMENT AGENCY

Freedom of Information Officer.

NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

Under Secretary.
Assistant Secretary.
Director, Office of Public Affairs.
Director, NOAA Corps.
General Counsel.
Assistant Administrator for Ocean Services and Coastal Zone Management.
Assistant Administrator for Fisheries.
Assistant Administrator for Weather Service.
Assistant Administrator for Environmental Satellite, Data, and Information Service.
Assistant Administrator for Oceanic and Atmospheric Research.
Director, Environmental Research Laboratories.
Director, Office of Administration.
Director, Eastern Administrative Support Center.
Director, Central Administrative Support Center.
Director, Western Administrative Support Center.
Director, Mountain Administrative Support Center.

NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION

Deputy Assistant Secretary.
Chief Counsel.
Legal Advisor.

PATENT AND TRADEMARK OFFICE

Solicitor, Deputy Solicitor.

UNITED STATES TRAVEL AND TOURISM ADMINISTRATION

Under Secretary.
Director, Office of Management and Administration.

[56 FR 50233, May 6, 1991, as amended at 57 FR 28781, June 29, 1992; 57 FR 48969, Oct. 29, 1992]

PART 4a—CLASSIFICATION, DECLASSIFICATION AND PUBLIC AVAILABILITY OF NATIONAL SECURITY INFORMATION

Subpart A—Classification of National Security Information

Sec.
4a.1 General.
4a.2 Director, Office of Security.
4a.3 Classification levels.
4a.4 Classification authority.
4a.5 Duration of classification.

Subpart B—Declassification

4a.6 General.
4a.7 Systematic review for declassification.
4a.8 Mandatory review for declassification.
4a.9 Requests under the Privacy Act and the Freedom of Information Act involving classified records.
4a.10 Presidential information.
4a.11 Foreign government information.
4a.12 Public availability of declassified information.

Subpart C—Access to Classified Information

4a.13 Access by persons outside the Executive branch.
4a.14 Access by industrial, educational, and commercial entities.
4a.15 Access by historical researchers and former presidential appointees.
4a.16 Access by foreign nationals, foreign governments, international organizations and immigrant aliens.

AUTHORITY: Sec. 5.3(b), E.O. 12356; 47 FR 14874, April 6, 1982; 47 FR 15557, April 12, 1982.

SOURCE: 48 FR 20040, May 4, 1983, unless otherwise noted.

Subpart A—Classification of National Security Information

§ 4a.1 General.

Executive Order 12356 provides the only basis for classifying information within the Department of Commerce, except as provided in the Atomic Energy Act of 1954. The policy of the Department of Commerce is to make information concerning its activities available to the public consistent with the need to protect the national defense or foreign relations as required by the interests of the United States and its citizens. Accordingly, security classification shall be applied only to protect the national security.

§ 4a.2 Director, Office of Security.

The Director is responsible for (a) acting on all suggestions, complaints, and appeals not otherwise resolved, concerning the implementation and administration of E.O. 12356 and implementing directives, and (b) deciding all appeals from denials of requests for national security information under the Mandatory Review provision of E.O. 12356, when the initial denial was based

on continued classification under the Order. When acting on such appeals the Director shall confer, as necessary, with the Offices of the General Counsel, Information Management, and Personnel. The Director may solicit advise from various operating units as required. All suggestions, complaints, or appeals should be addressed to the Director, Office of Security, Room 5044, 14th Street and Constitution Avenue, NW., Washington, D.C. 20230.

§4a.3 Classification levels.

Information may be classified as national security information by a designated original classifier of the Department when it is determined that the information concerns one or more of the categories prescribed in E.O. 12356 and when the unauthorized disclosure of the information, either by itself or in the context of other information, reasonably could be expected to cause damage to the national security. The levels established by E.O. 12356 (Top Secret, Secret, and Confidential) are the only terms which may be applied to national security information. Except as provided by statute, no other terms shall be used within the Department of Commerce in conjunction with any of the three classification levels.

§4a.4 Classification authority.

Authority to originally classify information as Secret or Confidential may be exercised only by the Secretary of Commerce and by officials to whom such authority is specifically delegated. No official of the Department of Commerce is authorized to originally classify information as Top Secret.

§4a.5 Duration of classification.

Information shall remain classified as long as its unauthorized disclosure would result in damage to the national security. When it can be determined a specific date or event for declassification shall be set by the original classification authority at the time the information is originally classified. Automatic declassification markings applied under predecessor executive orders shall remain valid unless the classification is extended by an authorized declassification authority. Information classified under predecessor orders and marked for declassification review shall remain classified until reviewed for declassification under the provisions of E.O. 12356 governing systematic review or mandatory review for declassification.

Subpart B—Declassification

§4a.6 General.

Information that continues to meet the classification requirements prescribed in E.O. 12356 despite the passage of time will continue to be safeguarded. However, information which is properly classified at the time it is developed may not necessarily require protection indefinitely. National security information over which the Department of Commerce exercises final classification jurisdiction shall be declassified or downgraded as soon as national security considerations permit. When information is determined to be no longer damaging to the national security, it may continue to be exempt from public disclosure by law. If so, when the information is declassified the declassification authority shall indicate that all or portions of the information become FOR OFFICIAL USE ONLY and shall cite the authority which permits nondisclosure.

§4a.7 Systematic review for declassification.

Classified information constituting permanently valuable records of the Government, as defined by U.S.C. 2103, that is in the possession and control of the Department of Commerce or of the Archivist of the United States, shall be systematically reviewed for declassification. This review shall be in accordance with systematic review guidelines authorized by the Secretary of Commerce.

§4a.8 Mandatory review for declassification.

(a) *Requests.* Classified information under the jurisdiction of the Department of Commerce shall be reviewed for declassification upon receipt of a request by a United States citizen or permanent resident alien, a Federal agency, or a state or local government. A request for mandatory review of classified information shall be submitted

in writing and describe the information with sufficient specificity to locate it with a reasonable amount of effort. Request shall be submitted to the Director, Office of Security, U.S. Department of Commerce, Room 5044, 14th Street and Constitution Avenue, NW., Washington, D.C. 20230.

(b) *Processing requirements.* (1) The Director, Office of Security, shall acknowledge receipt of the request directly to the requester. When a request does not satisfy the conditions of paragraph (a) of this section, the requester shall be notified that unless additional identifying information is provided, no further action will be taken. The request shall be forwarded to the operating unit or office which originated the information or which has primary interest in the subject matter. The unit or office assigned action shall review the information within twenty working days as prescribed below.

(2) The action office shall determine whether, under the declassification provisions of the Department of Commerce National Security Information Manual, the entire document or portions thereof may be declassified. The action office shall also determine whether, if the document or portions are declassified, withholding the information is otherwise warranted under applicable statutes. Declassification of the information shall be accomplished by a designated declassification authority. Upon declassification the information shall be remarked. If the information may not be released in whole or in part, the reviewing official shall provide the reasons for denial by citing the applicable provision of section 1.3 of E.O. 12356. When the classification is a derivative decision based on classified source material of another Federal agency, the action office shall provide the information to the originator for review.

(3) The action office shall also determine if declassified information is otherwise available for public release under the Freedom of Information Act. If the information is not releasable, the reviewing official shall advise the Director, Office of Security, that the information has been declassified but that it is exempt from disclosure, citing the appropriate exemption of the Freedom of Information Act and applicable regulations.

(4) If the request for declassification is denied in whole or in part, the requester shall be notified of the right to appeal the determination within sixty days and of the procedures for such an appeal. If declassified information remains exempt from disclosure under the Freedom of Information Act, the requester shall be advised of those appellate procedures. All denials of information under the Freedom of Information Act must be approved by the Office of the Assistant General Counsel for Administration.

(c) *Fees.* If the request requires the rendering of services for which fees may be charged, the unit assigned action may calculate the anticipated amount of fees to be charged and ascertain the requester's willingness to pay the allowable charges as a precondition to taking further action on the request in accordance with §4.9 of Department of Commerce Freedom of Information Act rules and §4b.11 of the Department's Privacy Act rules.

(d) *Right of appeal.* (1) A requester may appeal to the Director, Office of Security, when the requested information is not declassified and released in whole. The Director shall determine, within thirty days after receipt of an appeal, whether continued classification of the requested information is required in whole or in part, notify the requester of his determination, and make available to the requester any information determined to be releasable. If continued classification is required under the provisions of this manual, the requester shall be notified of the final determination and of the reasons for denial.

(2) During the declassification review of information under appeal the Director, Office of Security, may overrule previous determinations in whole or in part when, in his judgment, continued protection in the interest of national security is no longer required. If the Director determines that the information no longer requires classification, it shall be declassified and, unless it is otherwise exempt from disclosure, released to the requester. The Director shall advise the original reviewing

Commerce office or unit of his decision.

§4a.9 Requests under the Privacy Act and the Freedom of Information Act involving classifed records.

(a) The Freedom of Information Act (FOIA), Title 5 U.S.C. 552(b)(1) and the Privacy Act of 1974 (PA), Title 5 U.S.C. 552a(k)(1), authorize withholding of records from public availability which are ''(1) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (2) are in fact properly classified pursuant to such Executive order.''

(b) Under the FOIA a determination on an initial request must be made within ten working days after receipt of the request. A determination on an appeal to an initial denial must be made within twenty working days after receipt of an FOIA appeal; or for a PA appeal, within thirty working days. Time limits are mandatory for an FOIA request, but are permissive for a PA request. Except for unusual circumstances, failure to make a determination within the stated time limits means that a requester has exhausted the administrative remedies and may bring suit immediately.

(c) Persons who request information under the provisions of these Acts, and whose requests are denied on appeal, may petition the courts to enjoin the Department of Commerce from withholding the record and, in this event, burden is on the Department of Commerce to sustain its actions.

(d) To assure that PA/FOIA requests involving classified records are subjected to a thorough classification review and that a response is made within the specified time limits, the procedures in paragraphs (e) and (f) shall apply as well as those of DAO 205–12 ''Public Information,'' DAO 205–14 ''Processing Requests Under the Freedom of Information Act,'' and DAO 205–15 ''Implementing the Privacy Act of 1974.''

(e) Initial requests involving classified records:

(1) The office determined to have primary interest shall conduct a declassification review of the information as prescribed in §4a.8(b) (2), (3), and (4).

(2) If the information is subsequently declassified, the action office shall consult with the Office of the Assistant General Counsel for Administration to determine releasibility with consideration only for the legality of release within the purview of PA/FOIA.

(3) If the record warrants continued classification, the action office shall coordinate with the Office of the Assistant General Counsel for Administration and so advise the requester, and further advise the requester of the right of appeal.

(4) If the classification review cannot be completed within the prescribed time limit, due to unusual circumstances, the action office shall advise the requester. An extension of time shall be arranged in accordance with the FOIA and implementing Commerce PA/FOIA rules.

(f) Receipt of an appeal for reconsideration of denial of a classified record under PA/FOIA: Appeals under this section shall be addressed to the General Counsel who shall refer the record(s) to the Director, Office of Security, for a declassification review. The Director may overrule previous determinations in whole or in part when, in his judgment, continued protection in the interest of national security is no longer required. If the information under review no longer requires classification, it shall be declassified. The Director shall advise the General Counsel of his decision.

§4a.10 Presidential information.

Information originated by the President, by the White House Staff, by committees, commissions, or boards appointed by the President, or by others specifically providing advice and counsel to a President or acting on behalf of a President is exempted from the provisions of mandatory review for declassification, except as consistent with applicable laws that pertain to presidential papers or records.

§4a.11 Foreign government information.

Requests for mandatory review for declassification of foreign government information shall be processed as prescribed in §4a.8(b). Consultation with the foreign source of the information

through appropriate channels may be required prior to final action on the request.

§ 4a.12 Public availability of declassified information.

A fundamental policy of the Department of Commerce is to make information available to the public to the maximum extent permitted by law. Information which is declassified, for any reason, loses its protective status in the interest of national security. Accordingly, declassified information shall be handled in every respect on the same basis as all other unclassified information.

Subpart C—Access to Classified Information

§ 4a.13 Access by persons outside the Executive branch.

Department of Commerce classified information may be made available to persons outside the Executive Branch provided that (a) they are engaged in historical research projects or previously have occupied policy-making positions to which they were appointed by the President, or (b) the information is necessary for their performance of a function related to a contract or other agreement with the U.S. Government. The Director, Office of Security, shall determine, prior to the release of classified information under this provision, the propriety of such action in the interest of national security and obtain assurance of the recipient's trustworthiness and need to know.

§ 4a.14 Access by industrial, educational, and commercial entities.

Bidders, contractors, grantees, educational, scientific or industrial organizations may receive classified information under the procedures prescribed in the Department of Defense Industrial Security Manual.

§ 4a.15 Access by historical researchers and former presidential appointees.

(a) Persons who are engaged in historical research projects or who have previously occupied policy-making positions to which they were appointed by the President may be authorized access to classified information provided that the head of the component with classification jurisdiction over the information:

(1) Makes a written determination that access is consistent with the interests of national security;

(2) Is assured by the Director, Office of Security, that the requestors have an appropriate determination of trustworthiness as a precondition to access;

(3) Obtains written agreements from requestors to safeguard the information to which they are given access in accordance with these regulations;

(4) Obtains written consent to a review by the Department of Commerce of their resultant notes and manuscripts for the purpose of determining that no classified information is contained therein; and

(5) Limits access granted to former Presidential appointees to items that the person originated, reviewed, signed, or received while serving as a Presidential appointee.

(b) The material requested should be clearly identified so that it can be located and compiled with a reasonable amount of effort. If the access requested by historical researchers or former Presidential appointees requires the rendering of services for which fair and equitable fees may be charged, the requestor shall be notified.

(c) The provisions of this section apply only to classified information, or any part of it, originated by the Department of Commerce or information that is now in the sole custody of the Department. Otherwise, the researcher shall be referred to the classifying agency. Operating units providing information under this section shall maintain custody of classified information at a Commerce facility.

§ 4a.16 Access by foreign nationals, foreign governments, international organizations and immigrant aliens.

Foreign nationals employed by the Department of Commerce may be granted access to classified information originated within the Department only for the specific classified project to which they are assigned and only

after they have met those requirements set forth in DAO 207–3, ''Security Requirements for Research Associates, Guest Workers and Trainees,'' and Appendix B of DAO 207–4, ''Security and Suitability Investigations of Personnel.'' If a need for access by foreign nationals (other than employees) is indicated, the Director, Office of Security, shall be consulted for decision on a case-by-case basis.

PART 4b—PRIVACY ACT

Sec.
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APPENDIX C TO PART 4b—FACSIMILE OF OFFICIAL FORM FOR INQUIRIES AND REQUESTS

AUTHORITY: 5 U.S.C. 552a; 5 U.S.C. 553; 5 U.S.C. 552; 5 U.S.C. 301; 44 U.S.C. 3101; Reorganization Plan No. 5 of 1950.

SOURCE: 40 FR 45621, Oct. 2, 1975; 40 FR 50662, Oct. 30, 1975; 40 FR 51168, Nov. 3, 1975, unless otherwise noted.

§4b.1 Purpose and scope.

(a) The purpose of this part is to establish policies and procedures for implementing the Privacy Act of 1974 (Pub. L. 93–579), particularly 5 U.S.C. 552a as added by the Act. The main objectives are to facilitate full exercise of rights conferred on individuals under the Act and to ensure the protection of privacy as to individuals on whom the Department maintains records in systems of records under the Act. The Department accepts the responsibility to act promptly and in accordance with the Act upon receipt of any inquiry, request or appeal from a citizen of the United States or an alien lawfully admitted for permanent residence into the United States, regardless of the age of the individual. Further, the Department accepts the obligations to maintain only such information on individuals as is relevant and necessary to the performance of its lawful functions, to maintain that information with such accuracy, relevancy, timeliness, and completeness as is reasonably necessary to assure fairness in determinations made by the Department about the individual, to obtain information from the individual to the extent practicable, and to take every reasonable step to protect that information from unwarranted disclosure. The Department will maintain no record describing how an individual exercises rights guaranteed by the First Amendment unless expressly authorized by statute or by the individual about whom the record is maintained or unless pertinent to and within the scope of an authorized law enforcement activity. An individual's name and address will not be sold or rented by the Department unless such action is specifically authorized by law; however, this provision shall not be construed to require the withholding of names and addresses otherwise permitted to be made public.

(b) This part applies to all units in the Department in order to assure the maximum amount of uniformity and consistency within the Department in its implementation of the Act. The units of the Department may promulgate supplementary orders and rules not inconsistent with this part.

(c) The Assistant Secretary for Administration is delegated responsibility for maintaining this part, for issuing such orders and directives internal to the Department as are necessary for full compliance with the Act, and for effecting publication of all required notices concerning systems of records.

(d) Matters outside the scope of this part include the following:

(1) Requests solely under the Freedom of Information Act (5 U.S.C. 552) and Part 4 of this title;

(2) Requests involving information pertaining to an individual which is in a record or file but not within the scope of a system of records notice published in the FEDERAL REGISTER;

(3) Requests to correct a record where a grievance procedure is available to the individual either by regulation or by provision in a collective bargaining agreement with the Department or a unit of the Department, and the individual has initiated, or has expressed in writing the intention of initiating, such grievance procedure. An individual selecting the grievance procedure waives the use of the procedures in this part to correct or amend a record; and,

(4) Requests for employee-employer services and counseling which were routinely granted prior to enactment of the Act, including, but not limited to, test calculations of retirement benefits, explanations of health and life insurance programs, and explanations of tax withholding options.

(e) The selection of the appropriate method for processing an individual's request for records depends on the status or capacity of the individual, the wording of the request and the character of the records requested. The Department anticipates the following situations and will undertake processing as indicated:

(1) Requester is the individual to whom the record pertains and the requester expressly states only that the request is under the Act—The request will be processed under the Act and this part;

(2) Requester is the individual to whom the record pertains and the requester expressly states only that the request is under the Freedom of Information Act—The request will be processed under the Freedom of Information Act and the Department's implementing regulations (Part 4 of this chapter);

(3) Requester is the individual to whom the record pertains and the requester expressly states that the request is under both the Act and the Freedom of Information Act—The request will be processed concurrently under both statutes and the Department's respective implementing regulations. For such dual requests the Department will follow the fee provisions under the Act and this part, and follow the time limits under the Freedom of Information Act and Part 4 of this title;

(4) Requester is the individual to whom the record pertains and the requester fails to specify whether the request is under the Act or the Freedom of Information Act or both—The Department will respond to the requester and ask for clarification of the requester's intention as to processing. The request will not be deemed to have been ''received'' for purposes of measuring time periods for response until the clarification actually has been received by the appropriate official of the Department; and,

(5) Requester (i) is not an individual or (ii) is an individual but not the individual to whom the record pertains or one asserting parentage or guardianship as permitted under the Act—The request will be processed under the Freedom of Information Act and the Department's implementing regulations or under other applicable procedures.

[40 FR 45621, Oct. 2, 1975; 40 FR 50662, Oct. 30, 1975; 40 FR 51168, Nov. 3, 1975, as amended at 53 FR 26236, July 12, 1988]

§ 4b.2 Definitions.

(a) All terms used in this part which are defined in 5 U.S.C. 552a shall have the same meaning herein.

(b) As used in this part:

(1) The term *Act* means the ''Privacy Act of 1974,'' Pub. L. 93–579.

(2) The term *appeal* means the request by an individual that an initial denial of a request for correction or amendment by that individual be reviewed and reversed.

(3) The term *Department* means the Department of Commerce.

(4) The term *inquiry* means either a request for general information regarding the Act and this part or a request by an individual (or that individual's parent or guardian) that the Department determine whether it has any

record in a system of records which pertains to that individual.

(5) The term *person* means any human being and also shall include but not be limited to, corporations, associations, partnerships, trustees, receivers, personal representatives, and public or private organizations.

(6) The term *Privacy Officer* means those officials, identified in Appendix A to this part, who are authorized to receive and act upon inquiries, requests for access, and requests for correction or amendment.

(7) The term *request for access* means a request by an individual to see a record which is in a particular system of records and which pertains to that individual.

(8) The term *request for correction or amendment* means the request by an individual that the Department change (either by correction, amendment, addition or deletion) a particular record in a system of records which pertains to that individual.

(9) The term *unit of the Department* and *unit* means the office of the Secretary of Commerce and operating units of the Department as defined in Department Organization Order 1–1, ''Mission and Organization of the Department of Commerce'' (35 FR 19704, December 27, 1970).

[40 FR 45621, Oct. 2, 1975; 40 FR 50662, Oct. 30, 1975; 40 FR 51168, Nov. 3, 1975, as amended at 53 FR 26236, July 12, 1988]

§4b.3 Procedures for inquiries pertaining to individual records in a record system.

(a) Any individual, regardless of age, who is a citizen of the United States or an alien lawfully admitted for permanent residence into the United States may submit an inquiry to the Department. The inquiry should be made either in person or by mail addressed to the appropriate Privacy Officer identified in Appendix A to this part or to the official identified in the notification procedures paragraph of the systems of records notice published in the FEDERAL REGISTER. If an individual believes the Department maintains a record pertaining to that individual but does not know which system of records might contain such a record and/or which unit of the Department maintains the system of records, assistance in person or by mail will be provided at the first address listed in Appendix A to this part. The offices of Privacy Officers are open to the public between the hours of 9:00 a.m. and 4:00 p.m., Monday through Friday (excepting holidays).

(b) The processing of inquiries submitted by mail will be facilitated if the words ''PRIVACY ACT INQUIRY'' appear in capital letters on the face of the envelope.

(c) The Department has an official form for making inquiries and requests, a facsimile of which is Appendix C to this part. Its use is urged. Copies may be obtained by contacting any of the officials in Appendix A to this part. Copies also may be obtained by contacting any facility of the Department which offers direct services to the public. Please consult your telephone directory under the listing ''United States Government—Commerce Department.''

(d) If, for some reason, an individual is unable to use the Department's official form, the letter should bear the words ''PRIVACY ACT INQUIRY'' in capital letters at the top. If the inquiry is for general information regarding the Act and this part, no particular information is required. If the inquiry is a request that the Department determine whether it has, in a given system of records, a record which pertains to the individual, the following information should be submitted:

(1) Name of individual whose record is sought;

(2) Individual whose record is sought is either a U.S. citizen or an alien lawfully admitted for permanent residence;

(3) Identifying data that will help locate the record (for example, maiden name, occupational license number, period or place of employment, etc.);

(4) Record sought, by description and by record system name, if known;

(5) Action requested (that is, send information on how to exercise rights under the Act; does requested record exist; access to requested record; or copy of requested record);

(6) Copy of court guardianship order or minor's birth certificate, as provided in §4b.4(f)(3), but only if requester is

guardian or parent of individual whose record is sought;

(7) Requester's name (printed), signature, address, and telephone number (optional);

(8) Date; and,

(9) Certification of request by notary or other official, but only if (i) request is for notification that requested record exists, for access to requested record or for copy of requested record; (ii) record is not available to any person under 5 U.S.C. 552; and (iii) requester does not appear before an employee of the Department for verification of identity.

The Department reserves the right to require compliance with the identification procedures appearing at § 4b.4(f) where circumstances warrant.

(e) Any inquiry which is not addressed as specified in paragraph (a) of this section or which is not marked as specified in paragraphs (b) and (d) of this section will be so addressed and marked by Department personnel and forwarded immediately to the responsible Privacy Officer. An inquiry which is not properly addressed by the individual will not be deemed to have been ''received'' for purposes of measuring time periods for response until actual receipt by the Privacy Officer. In each instance when an inquiry so forwarded is received, the Privacy Officer shall notify the individual that his or her inquiry was improperly addressed and the date when the inquiry was received at the proper address.

(f)(1) Each inquiry received shall be acted upon promptly by the responsible Privacy Officer. Every effort will be made to respond within ten days (excluding Saturdays, Sundays and holidays) of the date of receipt. If a response cannot be made within ten days, the Privacy Officer shall send an acknowledgment during that period providing information on the status of the inquiry and asking for such further information as may be necessary to process the inquiry. The first correspondence sent by the Privacy Officer to the requester shall contain the Department's control number assigned to the request, as well as a note that the requester should use that number in all future contacts in order to facilitate processing. The Department shall use that control number in all subsequent correspondence.

(2) If the Privacy Officer fails to send an acknowledgment within ten days, as provided above, the requester may ask the General Counsel, to take corrective action. No failure of a Privacy Officer to send an acknowledgment shall confer administrative finality for purposes of judicial review.

(g) An individual shall not be required to state a reason or otherwise justify his or her inquiry.

(h) Special note should be taken of the fact that certain agencies are responsible for publishing notices of systems of records having Government-wide application to other agencies, including the Department. The agencies known to be publishing these general notices and the types of records covered therein appear in Appendix B to this part. These general notices do not identify the Privacy Officers in the Department to whom inquiries should be presented or mailed. The provisions of this section, and particularly paragraph (a) of this section, should be followed in making inquiries with respect to such records. Such records in the Department are subject to the provisions of this part to the extent indicated in Appendix B to this part. The exemptions, if any, determined by the agency publishing a general notice shall be invoked and applied by the Department after consultation, as necessary, with that other agency.

[40 FR 45621, Oct. 2, 1975; 40 FR 50662, Oct. 30, 1975; 40 FR 51168, Nov. 3, 1975, as amended at 53 FR 26236, July 12, 1988]

§ 4b.4 Times, places, and requirements for identification of individuals making requests for access.

(a) Any individual, regardless of age, who is a citizen of the United States or an alien lawfully admitted for permanent residence into the United States may submit a request for access to records to the Department. The request should be made either in person or by mail addressed to the responsible Privacy Officer identified in Appendix A to this part. The offices of Privacy Officers are open to the public between the hours of 9:00 a.m. and 4:00 p.m. Monday through Friday (excluding holidays).

(b) The Department has an official form for making requests, a facsimile of which is Appendix C to this part. Its use is urged. Copies may be obtained by contacting any of the officials listed in Appendix A to this part. Copies also may be obtained by contacting any facility of the Department which offers direct services to the public. Please consult your telephone directory under the listing ''United States Government—Commerce Department.''

(c) The processing of requests submitted by mail will be facilitated if the words ''PRIVACY ACT REQUEST'' appear in capital letters on the face of the envelope. If, for some reason, an individual is unable to use the Department's official form the letter should bear the words ''PRIVACY ACT REQUEST'' in capital letters at the top.

(d) Any request which is not addressed as specified in paragraph (a) of this section or which is not marked as specified in paragraph (c) of this section will be so addressed and marked by Department personnel and forwarded immediately to the responsible Privacy Officer. A request which is not properly addressed by the individual will not be deemed to have been ''received'' for purposes of measuring time periods for response until actual receipt by the Privacy Officer. In each instance when a request so forwarded is received, the Privacy Officer shall notify the individual that his or her request was improperly addressed and the date when the request was received at the proper address.

(e) If the request follows inquiry under § 4b.3 in connection with which the individual's identity was established by the Department, the individual need only indicate the record to which access is sought, give the Department control number assigned to the request, and sign and date the request. If the request is not preceded by an inquiry under § 4b.3, the procedures of either § 4b.3(c) or § 4b.3(d) of this part should be followed.

(f) The requirements for identification of individuals seeking access to records are as follows:

(1) *In person*. Each individual making a request in person shall be required to present satisfactory proof of identity. The means of proof, in the order of preference and priority, are:

(i) A document bearing the individual's photograph (for example, driver's license, passport or military or civilian identification card);

(ii) A document, preferably issued for participation in a federally sponsored program, bearing the individual's signature (for example, unemployment insurance book, employer's identification card, national credit card, and professional, craft or union membership card); and,

(iii) A document bearing neither the photograph nor the signature of the individual, preferably issued for participation in a federally sponsored program (for example, Medicaid card).

In the event the individual can provide no suitable documentation of identity, the Department will require a signed statement asserting the individual's identity and stipulating that the individual understands the penalty provision of 5 U.S.C. 552a(i)(3) recited in § 4b.12(a). For the convenience of the public, and in addition to the Privacy Officers listed in Appendix A to this part, most facilities which are open to the public and operated by the Department outside Metropolitan Washington, D.C. have employees authorized to determine the identity of an individual. However, such employees are not authorized to take any other action with respect to a request except to transmit the request to the responsible Privacy Officer. In order to avoid any unwarranted disclosure of an individual's records, the Department reserves the right to determine the adequacy of proof of identity offered by any individual, particularly when the request involves a sensitive record.

(2) *Not in person*. If the individual making a request does not appear in person before a Privacy Officer or other employee authorized to determine identity, a certificate of a notary public or equivalent officer empowered to administer oaths must accompany the request under the circumstances prescribed in § 4b.3(d)(9). The Department's official form for requests contains a certificate. If, for some reason, the individual is unable to use the official form, the certificate within or attached

to the letter must be substantially in accord with the following text:

City of ————
County of ———————— :ss

(Name of individual), who affixed (his) (her) signature below in my presence, came before me, a (title), in and for the aforesaid County and State, this ——— day of ————, 19—, and established (his) (her) identity to my satisfaction.

My commission expires ————.

(Signature)

(3) *Parents of minors and legal guardians.* An individual acting as the parent of a minor or the legal guardian of the individual to whom a record pertains shall establish his or her personal identity in the same manner prescribed in either paragraph (f)(1) or (2) of this section. In addition, such other individual shall establish his or her identity in the representative capacity of parent or legal guardian. In the case of the parent of a minor, the proof of identity shall be a certified or authenticated copy of the minor's birth certificate. In the case of a legal guardian of an individual who has been declared incompetent due to physical or mental incapacity or age by a court of competent jurisdiction, the proof of identity shall be a certified or authenticated copy of the court's order. For purposes of the Act, a parent or legal guardian may represent only a living individual, not a decedent. A parent or legal guardian may be accompanied during personal access to a record by another individual, provided the provisions of § 4b.5(f) are satisfied.

(g) When the provisions of this part are alleged to have the effect of impeding an individual in exercising his or her right to access, the Department will consider, from an individual making a request, alternative suggestions regarding proof of identity and access to records.

(h) An individual shall not be required to state a reason or otherwise justify his or her request for access to a record.

[40 FR 45621, Oct. 2, 1975; 40 FR 50662, Oct. 30, 1975; 40 FR 51168, Nov. 3, 1975, as amended at 53 FR 26236, July 12, 1988]

§ 4b.5 Disclosure of requested information to individuals.

(a)(1) Each request received shall be acted upon promptly by the responsible Privacy Officer. Every effort will be made to respond within ten days (excluding Saturdays, Sundays and holidays) of the date of receipt. If a response cannot be made within ten days due to unusual circumstances, the Privacy Officer shall send an acknowledgment during that period providing information on the status of the request and asking for such further information as may be necessary to process the request. ''Unusual circumstances'' shall include circumstances where a search for and collection of requested records from inactive storage, field facilities or other establishments are required, cases where a voluminous amount of data is involved, instances where information on other individuals must be separated or expunged from the particular record, and cases where consultations with other agencies having a substantial interest in the determination of the request are necessary.

(2) If the Privacy Officer fails to send an acknowledgment within ten days, as provided above, the requester may ask the responsible General Counsel, to take corrective action. No failure of a Privacy Officer to send an acknowledgment shall confer administrative finality for purposes of judicial review.

(b) *Grant of access*—(1) *Notification.* An individual shall be granted access to a record pertaining to him or her, except where the provisions of paragraph (g)(1) of this section apply. The Privacy Officer shall notify the individual of a determination to grant access and provide the following information:

(i) The methods of access, as set forth in paragraph (b)(2) of this section;

(ii) The place at which the record may be inspected;

(iii) The earliest date on which the record may be inspected and the period of time that the records will remain available for inspection. In no event shall the earliest date be later than thirty days from the date of notification;

(iv) The estimated date by which a copy of the record could be mailed and the estimate of fees pursuant to § 4b.11

of this part. In no event shall the estimated date be later than thirty days from the date of notification;

(v) The fact that the individual, if he or she wishes, may be accompanied by another individual during personal access, subject to the procedures set forth in paragraph (f) of this section; and,

(vi) Any additional requirements needed to grant access to a specific record.

(2) *Methods of access.* The following methods of access to records by an individual may be available depending on the circumstances of a given situation:

(i) Inspection in person may be had in the office specified by the Privacy Officer granting access, during the hours indicated in § 4b.4(a);

(ii) Transfer of records to a Federal facility more convenient to the individual may be arranged, but only if the Privacy Officer determines that a suitable facility is available, that the individual's access can be properly supervised at that facility, and that transmittal of the records to that facility will not unduly interfere with operations of the Department or involve unreasonable costs, in terms of both money and manpower; and,

(iii) Copies may be mailed at the request of the individual, subject to payment of the fees prescribed in § 4b.11. The Department, at its own initiative, may elect to provide a copy by mail, in which case no fee will be charged the individual.

(c) Access to medical records is governed by the provisions of § 4b.6.

(d) The Department shall supply such other information and assistance at the time of access as to make the record intelligible to the individual.

(e) The Department reserves the right to limit access to copies and abstracts of original records, rather than the original records. This election would be appropriate, for example, when the record is in an automated data media such as tape or disc, when the record contains information on other individuals, and when deletion of information is permissible under exemptions (for example, 5 U.S.C. 552a(k)(2)). In no event shall original records of the Department be made available to the individual except under the immediate supervision of the Privacy Officer or his designee. Title 18, United States Code, section 2701(a) makes it a crime to conceal, mutilate, obliterate, or destroy any record filed in a public office, or to attempt to do any of the foregoing.

(f) Any individual who requests access to a record pertaining to that individual may be accompanied by another individual of his or her choice. ''Accompanied'' includes discussion of the record in the presence of the other individual. The individual to whom the record pertains shall authorize the presence of the other individual in writing and shall include the name of the other individual, a specific description of the record to which access is sought, the Department control number assigned to the request, the date and the signature of the individual to whom the record pertains. The other individual shall sign the authorization in the presence of the Privacy Officer. An individual shall not be required to state a reason or otherwise justify his or her decision to be accompanied by another individual during personal access to a record.

(g) *Initial denial of access*—(1) *Grounds.* Access by an individual to a record which pertains to that individual will be denied only upon a determination by the Privacy Officer that:

(i) The record is exempt under §§ 4b.13 and 4b.14 or exempt by determination of another agency publishing notice of the system of records, as described in § 4b.3(h);

(ii) The record is information compiled in reasonable anticipation of a civil action or proceeding;

(iii) The provisions of § 4b.6 pertaining to medical records temporarily have been invoked; or,

(iv) The individual unreasonably has failed to comply with the procedural requirements of this part.

(2) *Notification.* The Privacy Officer shall give notice of denial of access to records to the individual in writing and shall include the following information:

(i) The Privacy Officer's name and title or position;

(ii) The date of the denial;

(iii) The reasons for the denial, including citation to the appropriate section of the Act and this part;

(iv) The individual's opportunities, if any, for further administrative consideration, including the identity and address of the responsible official. If no further administrative consideration within the Department is available, the notice shall state that the denial is administratively final; and,

(v) If stated to be administratively final within the Department, the individual's right to judicial review provided under 5 U.S.C. 552a(g)(1), as limited by 5 U.S.C. 552a(g)(5).

(3) *Administrative review*. When an initial denial of a request is issued by the Privacy Officer, the individual's opportunities for further consideration shall be as follows:

(i) As to denial under paragraph (g)(1)(i) of this section, two opportunities for further consideration are available in the alternative:

(A) If the individual contests the application of the exemption to the records, review procedures in § 4b.5(g)(3)(ii) shall apply; or,

(B) If the individual challenges the exemption itself, the procedure is a petition for the issuance, amendment, or repeal of a rule under 5 U.S.C. 553(e). If the exemption was determined by the Department, such petition shall be filed with the Assistant Secretary for Administration. If the exemption was determined by another agency, referred to in § 4b.3(h), the Department will provide the individual with the name and address of the other agency and any relief sought by the individual shall be that provided by the regulations of the other agency. Within the Department, no such denial is administratively final until such a petition has been filed by the individual and disposed of on the merits by the Assistant Secretary for Administration.

(ii) As to denial under paragraphs (g)(1)(ii), (g)(1)(iv) of this section or (to the limited extent provided in paragraph (g)(3)(i)(A) of this section) paragraph (g)(1)(i), the individual may file for review with the General Counsel, as indicated in the Privacy Officer's initial denial notification. The procedures appearing in § 4b.8 shall be followed by both the individual and the Department to the maximum extent practicable.

(iii) As to denial under paragraph (g)(1)(iii) of this section, no further administrative consideration within the Department is available because the denial is not administratively final until expiration of the time period indicated in § 4b.6(a).

(h) If a request is partially granted and partially denied, the Privacy Officer shall follow the appropriate procedures of this section as to the records within the grant and the records within the denial.

[40 FR 45621, Oct. 2, 1975; 40 FR 50662, Oct. 30, 1975; 40 FR 51168, Nov. 3, 1975, as amended at 53 FR 26236, July 12, 1988]

§ 4b.6 Special procedures: Medical records.

(a) No response to any request for access to medical records by an individual will be issued by the Privacy Officer for a period of seven days (excluding Saturdays, Sundays and holidays) from the date of receipt.

(b) The Department has published as a routine use, for all systems of records containing medical records, consultations with an individual's physician or psychologist if, in the sole judgment of the Department, disclosure could have an adverse effect upon the individual. The mandatory waiting period set forth in paragraph (a) of this section will permit exercise of this routine use in appropriate cases. The Department will pay no cost of any such consultation.

(c) In every case of a request by an individual for access to medical records, the Privacy Officer shall:

(1) Inform the individual of the waiting period prescribed in paragraph (a) of this section;

(2) Obtain the name and address of the individual's physician and/or psychologist, if the individual consents to give them;

(3) Obtain specific, written consent for the Department to consult the individual's physician and/or psychologist in the event that the Department believes such consultation is advisable, if the individual consents to give such authorization;

(4) Obtain specific, written consent for the Department to provide the medical records to the individual's physician or psychologist in the event that the Department believes access to the record by the individual is best effected under the guidance of the individual's physician or psychologist, if the individual consents to give such authorization; and,

(5) Forward the individual's medical record to the Department's medical officer for review and a determination on whether consultation with or transmittal of the medical records to the individual's physician or psychologist is warranted. If the consultation with or transmittal of such records to the individual's physician or psychologist is determined to be warranted, the Department's medical officer shall so consult or transmit. Whether or not such a consultation or transmittal occurs, the Department's medical officer shall provide instruction to the Privacy Officer regarding the conditions of access by the individual to his or her medical records.

(d) If an individual refuses in writing to give the names and consents set forth in paragraphs (c)(2) through (4) of this section and the Department has determined that disclosure could have an adverse effect upon the individual, the Department shall give the individual access to said records by means of a copy, provided without cost to the requester, sent registered mail return receipt requested.

§4b.7 Request for correction or amendment to record.

(a) Any individual, regardless of age, who is a citizen of the United States or an alien lawfully admitted for permanent residence into the United States may submit a request for correction or amendment to the Department. The request should be made either in person or by mail addressed to the Privacy Officer who processed the individual's request for access to the record, and to whom is delegated authority to make initial determinations on requests for correction or amendment. The offices of Privacy Officers are open to the public between the hours of 9:00 a.m. and 4:00 p.m. Monday through Friday (excluding holidays).

(b) The processing of requests submitted by mail will be facilitated if the words ''PRIVACY ACT REQUEST'' appear in capital letters on the face of the envelope. If, for some reason, the individual is unable to use the Department's official form, the letter should bear the words ''PRIVACY ACT REQUEST'' in capital letters at the top.

(c) Any request which is not addressed as specified in paragraph (a) of this section or which is not marked as specified in paragraph (b) of this section will be so addressed and marked by Department personnel and forwarded immediately to the responsible Privacy Officer. A request which is not properly addressed by the individual will not be deemed to have been ''received'' for purposes of measuring time periods for response until actual receipt by the Privacy Officer. In each instance when a request so forwarded is received, the Privacy Officer shall notify the individual that his or her request was improperly addressed and the date when the request was received at the proper address.

(d) Since the request, in all cases, will follow a request for access under §4b.5, the individual's identity will be established by his or her signature on the request and use of the Department control number assigned to the request.

(e) A request for correction or amendment should include the following:

(1) A specific identification of the record sought to be corrected or amended (for example, description, title, date, paragraph, sentence, line and words);

(2) The specific wording to be deleted, if any;

(3) The specific wording to be inserted or added, if any, and the exact place at which to be inserted or added; and,

(4) A statement of the basis for the requested correction or amendment, with all available supporting documents and materials which substantiate the statement. The statement should identify the criterion of the Act being invoked, that is, whether the information in the record is unnecessary, inaccurate, irrelevant, untimely or incomplete.

§ 4b.8 Agency review of request for correction or amendment of record.

(a)(1)(i) Not later than ten days (excluding Saturdays, Sundays and holidays) after receipt of a request to correct or amend a record, the Privacy Officer shall send an acknowledgment providing an estimate of time within which action will be taken on the request and asking for such further information as may be necessary to process the request. The estimate of time may take into account unusual circumstances as described in § 4b.5(a). No acknowledgment will be sent if the request can be reviewed, processed and the individual notified of the results of review (either compliance or denial) within the ten days. Requests filed in person will be acknowledged in writing at the time submitted.

(ii) If the Privacy Officer fails to send the acknowledgment within the ten days, as provided above, the requester may ask the General Counsel, to take corrective action. No failure of a Privacy Officer to send an acknowledgment shall confer administrative finality for purposes of judicial review.

(2) Promptly after acknowledging receipt of a request, or after receiving such further information as might have been requested, or after arriving at a decision within the ten days, the Privacy Officer shall either:

(i) Make the requested correction or amendment and advise the individual in writing of such action, providing either a copy of the corrected or amended record or a statement as to the means whereby the correction or amendment was effected in cases where a copy cannot be provided (for example, erasure of information from a record maintained only in magnetically recorded computer files); or,

(ii) Inform the individual in writing that his or her request is denied and provide the following information:

(A) The Privacy Officer's name and title or position;

(B) The date of the denial;

(C) The reasons for the denial, including citation to the appropriate sections of the Act and this part; and,

(D) The procedures for appeal of the denial as set forth in § 4b.9, including the name and address of the General Counsel.

The term *promptly* in this subsection means within thirty days (excluding Saturdays, Sundays and holidays). If the Privacy Officer cannot make the determination within thirty days, the individual will be advised in writing of the reason therefor and of the estimated date by which the determination will be made.

(b) Whenever an individual's record is corrected or amended pursuant to a request by that individual, the Privacy Officer shall see to the notification of all persons and agencies to which the corrected or amended portion of the record had been disclosed prior to its correction or amendment, if an accounting of such disclosure required by the Act was made. The notification shall require a recipient agency maintaining the record to acknowledge receipt of the notification, to correct or amend the record and to apprise any agency or person to which it had disclosed the record of the substance of the correction or amendment.

(c) The following criteria will be considered by the Privacy Officer in reviewing a request for correction or amendment:

(1) The sufficiency of the evidence submitted by the individual;

(2) The factual accuracy of the information;

(3) The relevance and necessity of the information in terms of purpose for which it was collected;

(4) The timeliness and currency of the information in light of the purpose for which it was collected;

(5) The completeness of the information in terms of the purpose for which it was collected;

(6) The degree of risk that denial of the request could unfairly result in determinations adverse to the individual;

(7) The character of the record sought to be corrected or amended; and,

(8) The propriety and feasibility of complying with the specific means of correction or amendment requested by the individual.

(d) The Department will not undertake to gather evidence for the individual, but does reserve the right to verify the evidence which the individual submits.

(e) Correction or amendment of a record requested by an individual will be denied only upon a determination by the Privacy Officer that:

(1) The individual has failed to establish, by a preponderance of the evidence, the propriety of the correction or amendment in light of the criteria set forth in paragraph (c) of this section;

(2) The record sought to be corrected or amended is part of the official record in a terminated judicial, quasi-judicial or quasi-legislative proceeding to which the individual was a party or participant;

(3) The information in the record sought to be corrected or amended, or the record sought to be corrected or amended, is the subject of a pending judicial, quasi-judicial or quasi-legislative proceeding to which the individual is a party or participant;

(4) The correction or amendment would violate a duly enacted statute or promulgated regulation; or,

(5) The individual unreasonably has failed to comply with the procedural requirements of this part.

(f) If a request is partially granted and partially denied, the Privacy Officer shall follow the appropriate procedures of this section as to the records within the grant and the records within the denial.

[40 FR 45621, Oct. 2, 1975; 40 FR 50662, Oct. 30, 1975; 40 FR 51168, Nov. 3, 1975, as amended at 53 FR 26236, July 12, 1988]

§4b.9 Appeal of initial adverse agency determination on correction or amendment.

(a) When a request for correction or amendment has been denied initially under §4b.8, the individual may submit a written appeal within thirty days after the date of the initial denial. When an appeal is submitted by mail, the postmark is conclusive as to timeliness.

(b) An appeal shall be addressed to the General Counsel, Department of Commerce, Room 5882, Washington, DC 20230. The processing of appeals will be facilitated if the words ''PRIVACY APPEAL'' appear in capital letters on both the envelope and the top of the appeal papers. An appeal not addressed and marked as provided herein will be so marked by Department personnel when it is so identified, and will be forwarded immediately to the General Counsel. An appeal which is not properly addressed by the individual will not be deemed to have been ''received'' for purposes of measuring the time periods in this section until actual receipt by the General Counsel. In each instance when an appeal so forwarded is received, the General Counsel shall notify the individual that his or her appeal was improperly addressed and the date when the appeal was received at the proper address.

(c) The individual's appeal papers shall include a statement of the reasons why the initial denial is believed to be in error and the Department's control number assigned to the request. The appeal shall be signed by the individual. The record which the individual requests be corrected or amended and all correspondence between the Privacy Officer and the requester will be supplied by the Privacy Officer who issued the initial denial. While the foregoing normally will comprise the entire record on appeal, the General Counsel may seek additional information necessary to assure that the final determination is fair and equitable and, in such instances, the additional information will be disclosed to the individual to the greatest extent possible and an opportunity provided for comment thereon.

(d) No personal appearance or hearing on appeal will be allowed.

(e) The General Counsel shall act upon the appeal and issue a final determination in writing not later than thirty days (excluding Saturdays, Sundays and holidays) from the date on which the appeal is received; *Provided*, That the General Counsel may extend the thirty days upon deciding that a fair and equitable review cannot be made within that period, but only if the individual is advised in writing of the reason for the extension and the estimated date by which a final determination will issue. The estimated date should not be later than the sixtieth day (excluding Saturdays, Sundays and holidays) after receipt of the appeal unless unusual circumstances, as described in §4b.5(a), are met.

(f) If the appeal is determined in favor of the individual, the final determination shall include the specific corrections or amendments to be made and a copy thereof shall be transmitted promptly both to the individual and to the Privacy Officer who issued the initial denial. Upon receipt of such final determination, the Privacy Officer promptly shall take the actions set forth in § 4b.8(a)(2)(i) and (b).

(g) If the appeal is denied, the final determination shall be transmitted promptly to the individual and state the reasons for the denial. The notice of final determination also shall inform the individual of the following:

(1) The right of the individual under the Act to file a concise statement of reasons for disagreeing with the final determination. The statement ordinarily should not exceed one page and the Department reserves the right to reject a statement of excessive length. Such a statement shall be filed with the General Counsel. It should provide the Department control number assigned to the request, indicate the date of the final determination and be signed by the individual. The General Counsel shall acknowledge receipt of such statement and inform the individual of the date on which it was received;

(2) The facts that any such disagreement statement filed by the individual will be noted in the disputed record, that the purposes and uses to which the statement will be put are those applicable to the record in which it is noted, and that a copy of the statement will be provided to persons and agencies to which the record is disclosed subsequent to the date of receipt of such statement;

(3) The fact that the Department will append to any such disagreement statement filed by the individual, a copy of the final determination or summary thereof which also will be provided to persons and agencies to which the disagreement statement is disclosed; and,

(4) The right of the individual to judicial review of the final determination under 5 U.S.C. 552a(g)(1)(A), as limited by 5 U.S.C. 552a(g)(5).

(h) In making the final determination, the General Counsel shall employ the criteria set forth in § 4b.8(c) and shall deny an appeal only on the grounds set forth in § 4b.8(e).

(i) If an appeal is partially granted and partially denied, the General Counsel shall follow the appropriate procedures of this section as to the records within the grant and the records within the denial.

(j) Although a copy of the final determination or a summary thereof will be treated as part of the individual's record for purposes of disclosure in instances where the individual has filed a disagreement statement, it will not be subject to correction or amendment by the individual.

(k) The provisions of paragraphs (g)(1) through (3) of this section satisfy the requirements of 5 U.S.C. 552a(e)(3).

[40 FR 45621, Oct. 2, 1975; 40 FR 50662, Oct. 30, 1975; 40 FR 51168, Nov. 3, 1975, as amended at 53 FR 26236, July 12, 1988]

§ 4b.10 Disclosure of record to person other than the individual to whom it pertains.

(a) The Department may disclose a record pertaining to an individual to a person other than the individual to whom it pertains only in the following instances:

(1) Upon written request by the individual, including authorization under § 4b.5(f);

(2) With the prior written consent of the individual;

(3) To a parent or legal guardian under 5 U.S.C. 552a(h);

(4) When required by the Act and not covered explicitly by the provisions of 5 U.S.C. 552a(b); and

(5) When permitted under 5 U.S.C. 552a(b)(1) through (11), which read as follows:[1]

(i) To those officers and employees of the agency which maintains the record who have a need for the record in the performance of their duties;

(ii) Required under section 552 of this title;

(iii) For a routine use as defined in paragraph (a)(7) of this section and described under paragraph (e)(4)(D) of this section;

(iv) To the Bureau of the Census for purposes of planning or carrying out a

[1] 5 U.S.C. 552a(b)(4) has no application within the Department.

census or survey or related activity pursuant to the provisions of Title 13;

(v) To a recipient who has provided the agency with advance adequate written assurance that the record will be used solely as a statistical research or reporting record, and the record is to be transferred in a form that is not individually identifiable;

(vi) To the National Archives of the United States as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, or for evaluation by the Administrator of General Services or his designee to determine whether the record has such value;

(vii) To another agency or to an instrumentality of any governmental jurisdiction within or under the control of the United States for a civil or criminal law enforcement activity if the activity is authorized by law, and if the head of the agency or instrumentality has made a written request to the agency which maintains the record specifying the particular portion desired and the law enforcement activity for which the record is sought;

(viii) To a person pursuant to a showing of compelling circumstances affecting the health or safety of an individual if upon such disclosure notification is transmitted to the last known address of such individual;

(ix) To either House of Congress, or, to the extent of matter within its jurisdiction, any committee or subcommittee thereof, any joint committee of Congress or subcommittee of any such joint committee;

(x) To the Comptroller General, or any of his authorized representatives, in the course of the performance of the duties of the General Accounting Office; or

(xi) Pursuant to the order of a court of competent jurisdiction.

(b) The situations referred to in paragraph (a)(4) of this section include the following:

(1) 5 U.S.C. 552a(c)(4) requires dissemination of a corrected or amended record or notation of a disagreement statement by the Department in certain circumstances;

(2) 5 U.S.C. 552a(d) requires disclosure of records to the individual to whom they pertain, upon request;

(3) 5 U.S.C. 552a(g) authorizes civil action by an individual and requires disclosure by the Department to the court;

(4) Section 5(e)(2) of the Act authorizes release of any records or information by the Department to the Privacy Protection Study Commission upon request of the Chairman; and

(5) Section 6 of the Act authorizes the Office of Management and Budget to provide the Department with continuing oversight and assistance in implementation of the Act.

(c) The Privacy Officer shall make an accounting of each disclosure by him of any record contained in a system of records in accordance with 5 U.S.C. 552a(c) (1) and (2). Except for a disclosure made under 5 U.S.C. 552a(b)(7), the Privacy Officer shall make such accounting available to any individual, insofar as it pertains to that individual, on request submitted in accordance with §4b.4. The Privacy Officer shall make reasonable efforts to notify any individual when any record in a system of records is disclosed to any person under compulsory legal process, promptly upon being informed that such process has become a matter of public record.

§4b.11 Fees.

(a) The only fees to be charged to or collected from an individual under the provisions of this part are for copying records at the request of the individual.

(1) No fees shall be charged or collected for the following: Search for and retrieval of the records; review of the records; copying at the initiative of the Department without a request from the individual; transportation of records and personnel; and first-class postage.

(2) It is the policy of the Department to provide an individual with one copy of each record corrected or amended pursuant to his or her request without charge as evidence of the correction or amendment.

(3) As required by the United States Civil Service Commission in its published regulations implementing the Act, the Department will charge no fee

for a single copy of a personnel record covered by that Commission's Government-wide published notice of systems of records.

(b) The copying fees prescribed by paragraph (a) of this section are:

$0.07	Each copy of each page, up to 8½″ x 14″, made by photocopy or similar process.
$0.25	Each copy of each microform frame printed on paper.
$0.25	Each aperture card.
$0.25	Each 105-mm fiche.
$7.00	Each 100′ roll of 35-mm microfilm.
$6.00	Each 100′ roll of 16-mm microfilm.
$0.20	Each page of computer printout without regard to the number of carbon copies concurrently printed.

Other copying forms (e.g., typing or printing) will be charged at direct cost, including personnel and equipment costs.

(c) All copying fees shall be paid by the individual before the copying will be undertaken. Payments shall be made in cash or, preferably, by check or money order payable to ''U.S. Department of Commerce,'' and they shall be paid or sent to the office stated in the billing notice, or if none, to the Privacy Officer processing the request. Where appropriate, payment may be required in the form of certified check.

(d) A copying fee totaling $1 or less shall be waived, but the copying fees for contemporaneous requests by the same individual shall be aggregated to determine the total fee.

A copying fee shall not be charged or collected, or alternatively, it may be reduced, when it is determined by the Privacy Officer, based on a petition therefor, that the petitioning individual is indigent and that Department resources permit a waiver of all or part of the fee. An individual is deemed to be indigent when without income or resources sufficient to pay the fees.

(e) Special and additional services provided at the request of the individual, such as certification or authentication, postal insurance and special mailing arrangement costs, will be charged to the individual in accordance with other published regulations of the Department pursuant to statute (for example, 31 U.S.C. 483a).

(f) This section applies only to individuals making requests under this part. To the extent an individual makes a request under the Freedom of Information Act, as provided in § 4b.1(e)(2), (3) and (5), the fees provisions of this chapter shall apply. All other persons shall remain subject to fees and charges prescribed by other and appropriate authorities.

§ 4b.12 Penalties.

(a) The Act provides, in pertinent part:

> Any person who knowingly and willfully requests or obtains any record concerning an individual from an agency under false pretenses shall be guilty of a misdemeanor and fined not more than $5,000. (5 U.S.C. 552a(i)(3)).

(b) A person who falsely or fraudulently attempts to obtain records under the Act also may be subject to prosecution under such other criminal statutes as 18 U.S.C. 494, 495 and 1001.

§ 4b.13 General exemptions.

(a) Individuals may not have access to records maintained by the Department but which were provided by another agency which has determined by regulation that such information is subject to general exemption under 5 U.S.C. 552a(j). If such exempt records are within a request for access, the Department will advise the individual of their existence and of the name and address of the source agency. For any further information concerning the record and the exemption, the individual must contact that source agency.

(b) The general exemptions determined to be necessary and proper with respect to systems of records maintained by the Department, including the parts of each system to be exempted, the provisions of the Act from which they are exempted, and the justification for the exemption, are as follows:

(1) *Individuals identified in Export Administration compliance proceedings or investigations—COMMERCE/ITA–1.* Pursuant to 5 U.S.C. 552a(j)(2), these records are hereby determined to be exempt from all provisions of the Act, except 5 U.S.C. 552a (b), (c) (1) and (2), (e)(4) (A) through (F), (e) (6), (7), (9), (10), and (11), and (i). These exemptions are necessary to insure the proper functioning

of the law enforcement activity, to protect confidential sources of information, to fulfill promises of confidentiality, to maintain the integrity of the law enforcement process, to avoid premature disclosure of the knowledge of criminal activity and the evidentiary bases of possible enforcement actions, to prevent interference with law enforcement proceedings, to avoid disclosure of investigative techniques, and to avoid the endangering of law enforcement personnel. Section 7(c) of the Export Adminstration Act of 1969, as amended, also protects this information from disclosure.

(2) *Fisheries Law Enforcement Case Files—COMMERCE/NOAA–11.* Pursuant to 5 U.S.C. 552a(j)(2), these records are hereby determined to be exempt from all provisions of the Act, except 5 U.S.C. 552a (b), (c) (1) and (2), (e) (4) (A) through (F), (e) (6), (7), (9), (10), and (11), and (i). These exemptions are necessary to insure the proper functioning of the law enforcement activity, to protect confidential sources of information, to fulfill promises of confidentiality, to prevent interference with law enforcement proceedings, to avoid the disclosure of investigative techniques, to avoid the endangering of law enforcement personnel, to avoid premature disclosure of the knowledge of criminal activity and the evidentiary bases of possible enforcement actions, and to maintain the integrity of the law enforcement process.

(3) *Investigative Records—Contract and Grant Frauds and Employee Criminal Misconduct—COMMERCE/DEPT.–12.* Pursuant to 5 U.S.C. 552a(j)(2), these records are hereby determined to be exempt from all provisions of the Act, except 5 U.S.C. 552a (b), (c) (1) and (2), (e)(4) (A) through (F), (e) (6), (7), (9), (10), and (11), and (i). These exemptions are necessary to insure the proper functions of the law enforcement activity, to protect confidential sources of information, to fulfill promises of confidentiality, to prevent interference with law enforcement proceedings, to avoid the disclosure of investigative techniques, to avoid the endangering of law enforcement personnel, to avoid premature disclosure of the knowledge of criminal activity and the evidentiary bases of possible enforcement actions, and to maintain the integrity of the law enforcement process.

[40 FR 45621, Oct. 2, 1975; 40 FR 50662, Oct. 30, 1975; 40 FR 51168, Nov. 3, 1975, as amended at 43 FR 43020, Sept. 22, 1978]

§ 4b.14 Specific exemptions.

(a) Some systems of records under the Act which are maintained by the Department contain, from time to time, material subject to the exemption appearing at 5 U.S.C. 552a(k)(1), relating to national defense and foreign policy materials. The systems of records published in the FEDERAL REGISTER by the Department which are within this exemption are:

COMMERCE/ITA–1, COMMERCE/ITA–2, COMMERCE/ITA–3, COMMERCE/NOAA–11, COMMERCE/PAT–TM–4, COMMERCE/PAT–TM–6, COMMERCE/PAT–TM–7, COMMERCE/PAT–TM–8, COMMERCE/PAT–TM–9, COMMERCE/DEPT–12, COMMERCE/DEPT–13, and COMMERCE/DEPT–14.

The Department hereby asserts a claim to exemption of such materials wherever they might appear in such systems of records, or any systems of records, at present or in the future. The materials would be exempt from 5 U.S.C. 552a (c)(3), (d), (e)(1), (e)(4) (G), (H), and (I), and (f). The reason therefor is to protect the materials required by Executive order to be kept secret in the interest of the national defense and foreign policy.

(b) The specific exemptions determined to be necessary and proper with respect to systems of records maintained by the Department, including the parts of each system to be exempted, the provisions of the Act from which they are exempted, and the justification for the exemption, are as follows:

(1) *Exempt under 5 U.S.C. 552a(k)(1).* The systems of records exempt hereunder appear in paragraph (a) of this section. The claims for exemption of COMMERCE/DEPT–12, COMMERCE/ITA–1, and COMMERCE/NOAA–11 under this paragraph are subject to the condition that the general exemption claimed in § 4b.13(b)(3) is held to be invalid.

(2) *Exempt under 5 U.S.C. 552a(k)(2).* The systems of records exempt (some only conditionally), the sections of the

Act from which exempted, and the reasons therefor are as follows:

(i) Individuals identified in Export Administration compliance proceedings or investigations—COMMERCE/ITA–1, but only on condition that the general exemption claimed in § 4b.13(b)(1) is held to be invalid;

(ii) Individuals involved in export transactions—COMMERCE/ITA–2;

(iii) Fisheries Law Enforcement Case Files—COMMERCE/NOAA–11, but only on condition that the general exemption claimed in § 4b.13(b)(2) is held to be invalid;

(iv) Investigative Records—Contract and Grant Frauds and Employee Criminal Misconduct—COMMERCE/DEPT–12, but only on condition that the general exemption claimed in § 4b.13(b)(3) is held to be invalid;

(v) Investigative Records—Persons Within the Investigative Jurisdiction of the Department—COMMERCE/DEPT–13;

(vi) Litigation, Claims and Administrative Proceeding Records—COMMERCE/DEPT–14; and

(vii) Non-Registered Persons Rendering Assistance to Patent Applicants—COMMERCE/PAT–TM–5.

The foregoing are exempted from 5 U.S.C. 552a (c)(3), (d), (e)(1), (e)(4)(G), (H), and (I), and (f). The reasons for asserting the exemption are to prevent subjects of investigation from frustrating the investigatory process, to insure the proper functioning and integrity of law enforcement activities, to prevent disclosure of investigative techniques, to maintain the ability to obtain necessary information, to fulfill commitments made to sources to protect their identities and the confidentiality of information and to avoid endangering these sources and law enforcement personnel. Special note is taken of the fact that the proviso clause in this exemption imports due process and procedural protections for the individual. The existence and general character of the information exempted will be made known to the individual to whom it pertains.

(3) *Exempt under 5 U.S.C. 552a(k) (4).* The systems of records exempt, the sections of the Act from which exempted, and the reasons therefor are as follows:

(i) Agricultural Census Records for 1964 (partial), 1969, and 1974—COMMERCE/CENSUS–1;

(ii) Individual and Household Statistical Surveys and Special Census Studies Records—COMMERCE/CENSUS–3;

(iii) Minority-Owned Business Enterprises Survey Records—COMMERCE/CENSUS–4;

(iv) Population and Housing Census Records for 1960 and 1970—COMMERCE/CENSUS–5;

(v) Population Census Personal Service Records for 1900 and All Subsequent Decennial Censuses—COMMERCE/CENSUS–6; and

(vi) Special Censuses of Population Conducted for State and Local Government—COMMERCE/CENSUS–7.

The foregoing are exempted from 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G) (H), and (I), and (f). The reasons for asserting the exemption are to comply with the prescription of Title 13, United States Code, especially sections 8 and 9 relating to prohibitions against disclosure, and to avoid needless consideration of these records whose sole statistical use comports fully with a basic purpose of the Act, namely, no adverse determinations may be made from these records as to any identifiable individual.

(4) *Exempt under 5 U.S.C. 552a(k)(5).* The systems of records exempt (some only conditionally), the sections of the act from which exempted, and the reasons therefor are as follows:

(i) Applications to U.S. Merchant Marine Academy (USMMA)—COMMERCE/MA–1;

(ii) USMMA Midshipman Medical Files—COMMERCE/MA–17;

(iii) USMMA Midshipman Personnel Files—COMMERCE/MA–18;

(iv) USMMA Non-Appropriated fund Employees—COMMERCE/MA–19;

(v) Applicants for the NOAA Corps—COMMERCE/NOAA–4;

(vi) Commissioned Officer Official Personnel Folders—COMMERCE/NOAA–7;

(vii) Conflict of Interest Records, Appointed Officials—COMMERCE/DEPT–3;

(viii) Investigative Records—Contract and Grant Frauds and Employee Criminal Misconduct—COMMERCE/DEPT–12, but only on condition that

the general exemption claimed in § 4b.13(b)(3) is held to be invalid;

(ix) Investigative Records—Persons Within the Investigative Jurisdiction of the Department—COMMERCE/DEPT–13; and

(x) Litigation, Claims, and Administrative Proceeding Records—COMMERCE/DEPT–14.

The foregoing are exempted from 5 U.S.C. 552a (c)(3), (d), (e)(1), (e)(4) (G), (H), and (I), and (f). The reasons for asserting the exemption are to maintain the ability to obtain candid and necessary information, to fulfill commitments made to sources to protect the confidentiality of information, to avoid endangering these sources and, ultimately, to facilitate proper selection or continuance of the best applicants or persons for a given position or contract. Special note is made of the limitation on the extent to which this exemption may be asserted. The existence and general character of the information exempted will be made known to the individual to whom it pertains.

(c) At the present time, the Department claims no exemption under 5 U.S.C. 552a(k) (3), (6) and (7).

[40 FR 45621, Oct. 2, 1975; 40 FR 50662, Oct. 30, 1975; 40 FR 51168, Nov. 3, 1975, as amended at 43 FR 43021, Sept. 22, 1978]

APPENDIX A TO PART 4b—OFFICIALS TO RECEIVE INQUIRIES, REQUESTS FOR ACCESS AND REQUESTS FOR CORRECTION OR AMENDMENT

For records in systems of records located in [1]—	Privacy officer
The Office of the Secretary and all departmental staff offices.	Chief, Information Management Division, Room 6622, Herbert C. Hoover Building, Washington, D.C. 20230.
Office of the Inspector General.	Counsel to the Inspector General, Office of the Inspector General, Room 7892, Herbert C. Hoover Building, Washington, D.C. 20230.
Economic Affairs [2]	Privacy Act Officer, Office of Administration, Economic Affairs, Room 4079, Herbert C. Hoover Building, Washington, D.C. 20230.
Bureau of the Census ..	Associate Director for Management Services, Bureau of the Census, Room 2027, Federal Building 3, Washington, D.C. 20233.

APPENDIX A TO PART 4b—OFFICIALS TO RECEIVE INQUIRIES, REQUESTS FOR ACCESS AND REQUESTS FOR CORRECTION OR AMENDMENT—Continued

For records in systems of records located in [1]—	Privacy officer
Bureau of Export Administration.	Privacy Act Officer, Office of Security and Management Support, Bureau of Export Administration, Room 3889, Herbert C. Hoover Building, Washington, DC 20230.
Economic Development Administration.	Assistant Chief Counsel, Economic Development Administration, Room 7001, Herbert C. Hoover Building, Washington, D.C. 20230.
International Trade Administration.	Privacy Act Officer, Office of Organization and Management Support, International Trade Administration, Room 4102, Herbert C. Hoover Building, Washington, D.C. 20230.
Minority Business Development Agency.	Assistant Director for Operations, Minority Business Development Agency, Room 6723, Herbert C. Hoover Building, Washington, D.C. 20230.
National Institute of Standards & Technoloyy.	Deputy Director of Administration, National Institute of Standards & Technology, Room A1105, Administration Building, Washington, D.C. 20234.
National Oceanic and Atmospheric Administration.	Director, Office of Administration, National Oceanic and Atmospheric Administration, Room 1109, Herbert C. Hoover Building, Washington, D.C. 20230.
National Telecommunications and Information Administration.	Director of Administration, National Telecommunications and Information Administration, Room 4717, Herbert C. Hoover Building, Washington, D.C. 20230.
National Technical Information Service.	Manager, Management Analysis Division, National Technical Information Service, Room 209, Forbes Building, Springfield, Virginia 22161.
Patent and Trademark Office.	Solicitor, Patent and Trademark Office, Room 12C08 Gateway 2, Crystal City, Virginia 20231.
United States Travel and Tourism Administration.	Director, Office of Management and Administration, United States Travel and Tourism Administration, Room 1524, Herbert C. Hoover Building, Washington, D.C. 20230.

[1] If the location of the records within the Department is unknown, address the inquiry to the Privacy Officer for the Office of the Secretary.

[2] Economic Affairs includes: Office of the Under Secretary for Economic Affairs; Office of Chief Economist; Office of Strategic Resources; Office of Business Analysis; Bureau of Economic Analysis. The Bureau of the Census, and the National Technical Information Service, which also fall organizationally under Economic Affairs, are listed separately.

[51 FR 32207, Sept. 10, 1986, as amended at 53 FR 26236, July 12, 1988; 55 FR 38314, Sept. 18, 1990; 55 FR 38983, Sept. 24, 1990]

APPENDIX B TO PART 4b— SYSTEMS OF RECORDS NOTICED BY OTHER FEDERAL AGENCIES AND APPLICABLE TO RECORDS OF THE DEPARTMENT AND APPLICABILITY OF THIS PART THERETO

[See footnotes at end of table]

Category of Records	Other Federal agency
Federal Personnel Records.	Office of Personnel Management [1]
Federal Employee Compensation Act Program.	Department of Labor.[2]
Equal Employment Opportunity Appeal Complaints.	Equal Employment Opportunity Commission.[3]
Formal Complaints/Appeals of Adverse Personnel Actions.	Merit Systems Protection Board.[4]

[1] The provisions of this part do not apply to these records covered by notices of systems of records published by the Office of Personnel Management for all agencies. The regulations of OPM alone apply.

[2] The provisions of this part apply only initially to these records covered by notices of systems of records published by the U.S. Department of Labor for all agencies. The regulations of that Department attach at the point of any denial for access or for correction or amendment.

[3] The provisions of this part do not apply to these records covered by notices of systems of records published by the Equal Employment Opportunity Commission for all agencies. The regulations of the Commission alone apply.

[4] The provisions of this part do not apply to these records covered by notices of systems of records published by the Merit Systems Protection Board for all agencies. The regulations of the Board alone apply.

[51 FR 32207, Sept. 10, 1986. Redesignated at 53 FR 26236, July 12, 1988]

APPENDIX C TO PART 4b—FACSIMILE OF OFFICIAL FORM FOR INQUIRIES AND REQUESTS

DISCLOSURE OF LOBBYING ACTIVITIES

Approved by OMB
0348-0046

Complete this form to disclose lobbying activities pursuant to 31 U.S.C. 1352
(See reverse for public burden disclosure.)

1. Type of Federal Action:
☐ a. contract
b. grant
c. cooperative agreement
d. loan
e. loan guarantee
f. loan insurance

2. Status of Federal Action:
☐ a. bid/offer/application
b. initial award
c. post-award

3. Report Type:
☐ a. initial filing
b. material change
For Material Change Only:
year _____ quarter ____
date of last report _____

4. Name and Address of Reporting Entity:
☐ Prime ☐ Subawardee
Tier ____, *if known*:

Congressional District, *if known*:

5. If Reporting Entity in No. 4 is Subawardee, Enter Name and Address of Prime:

Congressional District, *if known*:

6. Federal Department/Agency:

7. Federal Program Name/Description:

CFDA Number, *if applicable*: _____

8. Federal Action Number, *if known*:

9. Award Amount, *if known*:
$

10. a. Name and Address of Lobbying Entity
(if individual, last name, first name, MI):

b. Individuals Performing Services *(including address if different from No. 10a)*
(last name, first name, MI):

(attach Continuation Sheet(s) SF-LLL-A, if necessary)

11. Amount of Payment *(check all that apply)*:
$ _____ ☐ actual ☐ planned

12. Form of Payment *(check all that apply)*:
☐ a. cash
☐ b. in-kind; specify: nature _____
value _____

13. Type of Payment *(check all that apply)*:
☐ a. retainer
☐ b. one-time fee
☐ c. commission
☐ d. contingent fee
☐ e. deferred
☐ f. other; specify: _____

14. Brief Description of Services Performed or to be Performed and Date(s) of Service, including officer(s), employee(s), or Member(s) contacted, for Payment Indicated in Item 11:

(attach Continuation Sheet(s) SF-LLL-A, if necessary)

15. Continuation Sheet(s) SF-LLL-A attached: ☐ Yes ☐ No

16. Information requested through this form is authorized by title 31 U.S.C. section 1352. This disclosure of lobbying activities is a material representation of fact upon which reliance was placed by the tier above when this transaction was made or entered into. This disclosure is required pursuant to 31 U.S.C. 1352. This information will be reported to the Congress semi-annually and will be available for public inspection. Any person who fails to file the required disclosure shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such failure.

Signature: _____
Print Name: _____
Title: _____
Telephone No.: _____ **Date:** _____

Federal Use Only:

Authorized for Local Reproduction
Standard Form - LLL

SPECIAL NOTICE

FALSE STATEMENTS SUBJECT TO CRIMINAL PENALTIES

The Privacy Act of 1974 (Pub. L. 93–579), 5 U.S.C. 552a(i)(3), states:

"Any person who knowingly and willfully requests or obtains any record concerning an individual from an agency under false pretenses shall be guilty of a misdemeanor and fined not more than $5,000."

[40 FR 45621, Oct. 2, 1975; 40 FR 50662, Oct. 30, 1975; 40 FR 51168, Nov. 3, 1975. Redesignated at 53 FR 26236, July 12, 1988]

PART 5—OPERATION OF VENDING STANDS

Sec.
5.1 Purpose.
5.2 Policy.
5.3 Assignment of functions and authorities.
5.4 Permits.
5.5 Vending machines.
5.6 Appeals.
5.7 Reports.
5.8 Approval of regulations.

AUTHORITY: Sec. 4, 68 Stat. 663; 20 U.S.C. 107.

SOURCE: 28 FR 7772, July 31, 1963, unless otherwise noted.

§5.1 Purpose.

This part prescribes regulations to assure the granting of preference to blind persons licensed under the provisions of the Randolph-Sheppard Vending Stand Act (49 Stat. 1559, as amended by the act of August 3, 1954, 68 Stat. 663; 20 U.S.C. 107) for the operation of vending stands (which term as used in this order includes vending machines).

§5.2 Policy.

(a) The Department adopts the Federal policy announced in the Randolph-Sheppard Vending Stand Act, as amended, to provide blind persons with remunerative employment to enlarge the economic opportunities of the blind and to stimulate the blind to greater efforts in striving to make themselves self-supporting.

(b) It shall be the policy of the Department to authorize blind persons licensed under the provisions of the Randolph-Sheppard Vending Stand Act, as amended to operate vending stands without any charge for space or necessary utilities on properties owned and occupied by the Department or on which the Department controls maintenance, operation, and protection.

(c) The Department will cooperate with the Department of Education and State licensing agencies in making surveys to determine whether and where vending stands may be properly and profitably operated by licensed blind persons.

(d) The application of a State licensing agency for a permit may be denied or revoked if it is determined that the interests of the United States would be adversely affected or the Department would be unduly inconvenienced by the issuance of a permit or its continuance.

(e) Disagreements concerning the denial, revocation, or modification of a permit may be appealed by the State licensing agency as set forth in §5.6.

[28 FR 7772, July 31, 1963, as amended at 55 FR 53489, Dec. 31, 1990]

§5.3 Assignment of functions and authorities.

(a) The Director, Office of Administrative Services, shall carry out the Department's responsibility to provide, in accordance with applicable law and regulation, the maximum opportunity for qualified blind persons to operate vending stands.

(b) Subject to instructions issued by the Director, Office of Administrative Services, the head of each primary organization unit shall be responsible for implementing this program within his area.

(c) The Director, Office of Administrative Services for the primary organization units located in the main Commerce building and the head of each other primary organization unit will make determinations with respect to the terms of permits including the location and operation of vending stands and machines in their respective areas.

(d) Unresolved differences and significant violations of the terms of permits shall be reported to the State licensing agency. Where no corrective action is forthcoming, the matter shall be referred to the Office of Vocational Rehabilitation, Department of Education for consideration prior to further action.

[28 FR 7772, July 31, 1963, as amended at 55 FR 53489, Dec. 31, 1990]

§5.4 Permits.

(a) No permit, lease, or other arrangement for the operation of a vending stand on property under control of the Department shall be entered into or renewed without first consulting the State licensing agency or equivalent authority.

(b) The permit shall be conditioned upon the vending stand meeting specified standards, including standards relating to appearance, safety, sanitation, maintenance, and efficiency of operation. Due regard shall be given to laws and regulations for the public welfare which are applicable, or would be applicable, if the property involved was not owned or controlled by the Federal Government.

(c) The permit shall specify the types of articles specified in section 2(a)(4) of the Act as amended (newspapers, periodicals, confections, tobacco products, articles dispensed automatically or in containers or wrappings in which they are placed before delivery to the vending stand). Such other related articles as the State licensing agency asks to be included shall be permitted to be sold, unless such factors as inadequacy of available facilities, safety, health, public welfare, or legal requirements demand otherwise.

(d) The permit shall contain a provision that alterations made by other than the United States shall be approved by and conducted under the supervision of an appropriate official of the Department or the primary organization unit concerned.

(e) The permit may contain other reasonable conditions necessary for the protection of the Government and prospective patrons of the stand.

(f) The permit shall describe the location of the stand proper and the location of any vending machines which are operated in conjunction with it.

§5.5 Vending machines.

(a) The income from any vending machines which are located within reasonable proximity to and are in direct competition with a vending stand for which a permit has been issued under these regulations shall be assigned to the operator of such stand.

(b) If a vending machine vends articles of a type authorized by the permit and is so located that it attracts customers who would otherwise patronize the vending stand, such machine shall be deemed to be in reasonable proximity to and direct competition with the stand.

§5.6 Appeals.

(a) In any instance where the Department of Commerce official as provided in §5.3(c) and the State licensing agency fail to reach agreement concerning the granting, revocation, or modification of a permit, the location, method of operation, assignment of proceeds, or other terms of a permit (including articles which may be sold), the State licensing agency shall be notified in writing by the Commerce official concerned that it has the right to appeal such disagreements, within 30 days of the notice, to the Assistant Secretary for Administration for investigation and final decision.

(b) Upon receipt of a timely appeal the Assistant Secretary for Administration will cause a full investigation to be made. The State licensing agency shall be given an opportunity to present information pertinent to the facts and circumstances of the case. The complete investigation report including the recommendations of the investigating officer shall be submitted to the Assistant Secretary for Administration within 60 days from the date of the appeal.

(c) The Assistant Secretary for Administration will render a final decision on the appeal within 90 days of the date of appeal.

(d) The State licensing agency will be informed of the final decision on its appeal. Copies of the decision will be forwarded to the Department of Commerce official concerned and the Department of Education.

[28 FR 7772, July 31, 1963, as amended at 55 FR 53489, Dec. 31, 1990]

§5.7 Reports.

No later than fifteen days following the end of each fiscal year the responsible officials set forth in §5.3(c) shall forward to the Director, Office of Administrative Services a report on activities under this order. The report shall include:

(a) The number of applications, including requests for installations initiated by the Department, for vending stands received from State licensing agencies;

(b) The number of such requests accepted or approved;

(c) The number denied, on which no appeal was made and the number denied on which an appeal was made; and

(d) The number and status of any requests still pending.

§ 5.8 Approval of regulations.

The provisions of this part have been approved by the Director, Bureau of the Budget, pursuant to Executive Order 10604, of April 22, 1955.

PART 6—CIVIL MONETARY PENALTY INFLATION ADJUSTMENTS

Sec.
6.1 Definitions.
6.2 Purpose and scope.
6.3 Limitation on *First Adjustments.*
6.4 Adjustments to penalties.
6.5 Effective date of adjustments.
6.6 Subsequent adjustments.

AUTHORITY: Sec. 4, as amended, and sec. 5, Pub. L. 101–410, 104 Stat. 890 (28 U.S.C. 2461 note); Pub. L. 104–134, 110 Stat. 1321, 28 U.S.C. 2461 note.

SOURCE: 61 FR 55093, Oct. 24, 1996, unless otherwise noted.

§ 6.1 Definitions.

As used in this part:

(a) *Inflation Adjustment Act* means the Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. 101–410, October 5, 1990, 104 Stat. 890, 28 U.S.C. 2461 note).

(b) *Improvement Act* means the Debt Collection Improvement Act of 1996 (Public Law 104–134, April 26, 1996).

(c) *Amended Section Four* means section 4 of the *Inflation Adjustment Act*, as amended by the *Improvement Act*.

(d) *Section Five* means section 5 of the *Inflation Adjustment Act*.

(e) *Department* means the Department of Commerce.

(f) *Secretary* means the Secretary of the Department of Commerce.

(g) *First Adjustments* means the inflation adjustments made by § 6.4 of this part which, as provided in § 6.5 of this part, are effective on October 23, 1996.

§ 6.2 Purpose and scope.

The purpose of this part is to make the inflation adjustment, described in *Section Five* and required by *Amended Section Four*, of each minimum and maximum civil monetary penalty provided by law within the jurisdiction of the *Department*.

§ 6.3 Limitation on First Adjustments.

Each of the *First Adjustments* may not exceed ten percent (10%) of the respective penalty being adjusted.

§ 6.4 Adjustments to penalties.

The civil monetary penalties provided by law within the jurisdiction of the respective agencies or bureaus of the *Department*, as set forth below in this section, are hereby adjusted in accordance with the inflation adjustment procedures prescribed in *Section Five*, from the amounts of such penalties in effect prior to October 23, 1996, to the amounts of such penalties, as thus adjusted.

(a) Bureau of Export Administration.

(1) 50 U.S.C. app. 2410(c), Export Administration Act,[1] Non-national security violation: from $10,000 to $11,000.

(2) 50 U.S.C. app. 2410(c), Export Administration Act[1] and Section 38 Arms Export Control Act, National security violation: from $100,000 to $110,000.

(3) 50 U.S.C. 1705(b), International Emergency Economic Powers Act, as invoked by E.O. 12924 (August 19, 1994) and E.O. 12938 (November 14, 1994), Export Administration Regulation violation: from $10,000 to $11,000.

(b) Economic Development Administration.

(1) 19 U.S.C. 2349, Trade Act of 1974, False statement, etc.: from $5,000 to $5,500.

(2) 42 U.S.C. 3220(a), Public Works and Economic Development Act of 1965, False statement, etc.: from $10,000 to $11,000.

(3) 42 U.S.C. 3220(b), Public Works and Economic Development Act of 1965, Embezzlement, etc.: from $10,000 to $11,000.

(c) Economics and Statistics Administration (ESA)/Census.

(1) 13 U.S.C. 304, Delinquency on delayed filing of export documentation: from $100 per/day (up to $1,000) to $110 per/day (up to $1,100).

(2) 13 U.S.C. 305, Collection of foreign trade statistics violations: from $1,000 to $1,100.

[1] See E.O. 12851 (June 11, 1993).

(d) ESA/Bureau of Economic Analysis.

(1) 22 U.S.C. 3105(a), International Investment and Trade in Services Act, Failure to furnish information: from a minimum of $2,500 to $2,750, and from a maximum of $25,000 to $27,500.

(2) [Reserved]

(e) Import Administration.

(1) 19 U.S.C. 81s, Foreign Trade Zone violation: from $1,000 to $1,100.

(2) 19 U.S.C. 1677f(f)(4), North American Free Trade Agreement Protective Order violation: from $100,000 to $110,000.

(f) National Oceanic and Atmospheric Administration.

(1) 15 U.S.C. 5623, Land Remote Sensing Policy Act of 1992 violation: from $10,000 to $10,900.

(2) 15 U.S.C. 5658, Land Remote Sensing Policy Act of 1992 violation: from $10,000 to $10,900.

(3) 16 U.S.C. 773f(3), Northern Pacific Halibut Act of 1982 violation: from $25,000 to $27,500.

(4) 16 U.S.C. 783, Sponge Act (1914), Violation involving catching or taking within specific areas: from $500 to $550.

(5) 16 U.S.C. 957, Tuna Convention Act of 1950 (1962):

(i) Violation of §957(a) [Fine at §957(d)]: from $25,000 to $27,500.

(A) Subsequent violation of section 957(a) [Fine at §957(d)]: from $50,000 to $55,000.

(B) [Reserved]

(ii) Violation of section 957(b) [Fine at section 957(e)]: from $1,000 to $1,100.

(A) Subsequent violation of §957(b) Fine at §957(e)]: from $5,000 to $5,500.

(B) [Reserved]

(iii) Violation of section 957(c) [Fine at section 957(f)]: from $100,000 to $110,000.

(6) 16 U.S.C. 971e(e), Atlantic Tunas Convention Act of 1975 (1995) violation: from $100,000 to $100,000.

(7) 16 U.S.C. 972f(b), Eastern Pacific Tuna Licensing Act of 1984:

(i) Violation of section 972f(a)(1)–(3): from $25,000 to $27,500.

(A) Subsequent violation of §972f(a)(1)–(3): from $50,000 to $55,000.

(B) [Reserved]

(ii) Violation of section 972f(a)(4)–(5): from $5,000 to $5,500.

(A) Subsequent violation of §972f(a)(4)–(5): from $5,000 to $5,500.

(B) [Reserved]

(iii) Violation of section 972f(a)(6): from $100,000 to $110,000.

(8) 16 U.S.C. 973f(a), South Pacific Tuna Act of 1988 violation: from $250,000 to $275,000.

(9) 16 U.S.C. 1375(a)(1), Marine Mammal Protection Act of 1972:

(i) Violation: from $10,000 to $11,000.

(ii) Knowing violation (1981): from $20,000 to $22,000.

(10) 16 U.S.C. 1437(c)(1), National Marine Sanctuaries Act (1992) violation: from $100,000 to $109,000.

(11) 16 U.S.C. 1540(a)(1), Endangered Species Act of 1973:

(i) Knowing violations or engaged in business of section 1538 (a)(1)(A), (B), (C), (D), (E), or (F), (a)(2)(A), (B), (C), or (D), (c), (d) (other than recordkeeping or filing reports), (f), or (g) (1988): from $25,000 to $27,500.

(ii) Other knowing or business-related violations (1988): from $12,000 to $13,200.

(iii) Otherwise (1978): from $500 to $550.

(12) 16 U.S.C. 1851 Note (Sec.5)(c)(1), Atlantic Striped Bass Conservation Act (1984) violation: from $1,000 to $1,100.

(13) 16 U.S.C. 1858, Magnuson Fishery Conservation and Management Act (1990): from $100,000 to $110,000.

(14) 16 U.S.C. 2437(a)(1), Antarctic Marine Living Resources Convention Act (1984):

(i) Knowing violation: from $10,000 to $11,000.

(ii) Violation: from $5,000 to $5,500.

(15) 16 U.S.C. 3373(a), Lacey Act Amendments of 1981:

(i) Violations involving possession, sale, or transport of fish/plants/wildlife (1981): from $10,000 to $11,000.

(ii) Marking violations of fish/plant/wildlife (1981): from $250 to $275.

(iii) False labeling/knowingly (1988): from $10,000 to $11,000.

(16) 16 U.S.C. 3606, Atlantic Salmon Convention Act of 1982 (1990): from $100,000 to $110,000.

(17) 16 U.S.C. 3637, Pacific Salmon Treaty Act of 1985 (1990): from $100,000 to $110,000.

(18) 30 U.S.C. 1462(a), Deep Seabed Hard Mineral Resources Act (1980): from $25,000 to $27,500.

(19) 42 U.S.C. 9152(c)(1), Ocean Thermal Energy Conversion Act of 1980: from $25,000 to $27,500.

§ 6.5 Effective date of adjustments.

The *First Adjustments* made by § 6.4 of this part, of the penalties there specified, are effective on October 23, 1996, and said penalties, as thus adjusted by the *First Adjustments* made by § 6.4 of this part, shall apply only to violations occurring after October 23, 1996, and before the effective date of any future inflation adjustment thereto made subsequent to October 23, 1996, as provided in § 6.6 of this part. The penalties specified in § 6.4 of this part which became effective prior to October 23, 1996, shall, without any *First Adjustments* thereto, apply only to violations occurring before October 24, 1996.

§ 6.6 Subsequent adjustments.

The *Secretary or his or her designee* by regulation shall, at least once every four years after October 23, 1996, make the inflation adjustment, described in *Section Five* and required by *Amended Section Four*, of each civil monetary penalty provided by law and within the jurisdiction of the *Department*.

PART 7—[RESERVED]

PART 8—NONDISCRIMINATION IN FEDERALLY-ASSISTED PROGRAMS OF THE DEPARTMENT OF COMMERCE—EFFECTUATION OF TITLE VI OF THE CIVIL RIGHTS ACT OF 1964

Subpart A—General Provisions; Prohibitions: Nondiscrimination Clause; Applicability to Programs

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APPENDIX A TO PART 8—PROGRAMS COVERED BY TITLE VI

AUTHORITY: Sec. 602, Civil Rights Act of 1964 (42 U.S.C. 2000d–1).

SOURCE: 38 FR 17938, July 5, 1973, unless otherwise noted.

Subpart A—General Provisions; Prohibitions: Nondiscrimination Clause; Applicability to Programs

§ 8.1 Purpose.

The purpose of this part is to effectuate the provisions of title VI of the Civil Rights Act of 1964 (hereafter referred to as the ''Act'') to the end that no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program receiving Federal financial assistance from the Department of Commerce. This part is consistent with achievement of the objectives of the statutes authorizing the financial assistance given by the Department of Commerce as provided in section 602 of the Act.

§ 8.2 Application of this part.

(a) This part applies to any program for which Federal financial assistance is authorized under a law administered by the Department, including the federally assisted programs listed in Appendix A to this part and as said Appendix may be amended. It applies to money paid, property transferred, or other Federal financial assistance extended under any such program after January 9, 1965, pursuant to an application approved prior to such effective date.

(b) This part does not apply to (1) any Federal financial assistance by way of insurance or guaranty contracts, (2) money paid, property transferred, or other assistance extended under any such program before January 9, 1965,

except where such assistance was subject to the title VI regulations of this Department or of any other agency whose responsibilities are now exercised by this Department, (3) any assistance to any individual who is the ultimate beneficiary under any such program, or (4) any employment practice, under any such program, of any employer, employment agency, or labor organization except to the extent described in §8.4(c). The fact that a program is not listed in Appendix A shall not mean, if title VI of the Act is otherwise applicable, that such program is not covered. Other programs under statutes now in force or hereinafter enacted may be added to the list by notice published in the FEDERAL REGISTER.

§8.3 Definitions.

(a) *Department* means the Department of Commerce, and includes each and all of its operating and equivalent other units.

(b) *Secretary* means the Secretary of Commerce.

(c) *United States* means the States of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and the territories and possessions of the United States, and the term *State* means anyone of the foregoing.

(d) *Person* means an individual in the United States who is or is eligible to be a participant in or an ultimate beneficiary of any program which receives Federal financial assistance, and includes an individual who is an owner or member of a firm, corporation, or other business or organization which is or is eligible to be a participant in or an ultimate beneficiary of such a program. Where a primary objective of the Federal financial assistance to a program is to provide employment, ''person'' includes employees or applicants for employment of a recipient or other party subject to this part under such program.

(e) *Responsible department official* with respect to any program receiving Federal financial assistance means the Secretary or other official of the Department who by law or by delegation has the principal authority within the Department for the administration of a law extending such assistance. It also means any officials so designated by due delegation of authority within the Department to act in such capacity with regard to any program under this part.

(f) *Federal financial assistance* includes (1) grants, loans, or agreements for participation in loans, of Federal funds, (2) the grant or donation of Federal property or interests in property, (3) the sale or lease of, or the permission to use (on other than a casual or transient basis), Federal property or any interest in such property or in property in which the Federal Government has an interest, without consideration, or at a nominal consideration, or at a consideration which is reduced, for the purpose of assisting the recipient, or in recognition of the public interest to be served by such sale or lease to or use by the recipient, (4) waiver of charges which would normally be made for the furnishing of Government services, (5) the detail of Federal personnel, (6) technical assistance, and (7) any Federal agreement, arrangement, contract, or other instrument which has as one of its purposes the provision of assistance.

(g) *Program* includes any program, project, or activity for the planning or provision of services, financial aid, property, other benefits, or facilities for furnishing services, financial aid, property, or other benefits, whether provided by the recipient or by others through contracts or other arrangements with the recipient, with the aid of Federal financial assistance, or with the aid of any non-Federal funds, property, facilities or other resources which are provided to meet the conditions under which Federal financial assistance is extended or which utilizes federally assisted property, facilities or resources.

(h) *Facility* includes all or any portion of structures, equipment, vessels, or other real or personal property or interests therein, and the provision of facilities includes the construction, expansion, renovation, remodeling, alteration, contract for use, or acquisition of facilities.

(i) *Recipient* means any governmental, public or private agency, institution, organization, or other entity, or any individual, who or which is an applicant for Federal financial assistance, or to whom Federal financial assistance is extended directly or through another recipient for or in connection with any program. Recipient further includes a subgrantee, an entity which leases or operates a facility for or on behalf of a recipient, and any successors, assignees, or transferees of any kind of the recipient, but does not include any person who is an ultimate beneficiary under any program.

(j) *Primary recipient* means any recipient which is authorized or required to extend or distribute Federal financial assistance to another recipient for the purpose of carrying out a program.

(k) *Applicant* means one who submits an application, request, or plan required to be approved by a responsible Department official, or by a primary recipient, as a condition to eligibility for Federal financial assistance, and ''application'' means such an application, request, or plan.

(l) *Other parties subject to this part* includes any governmental, public or private agency, institution, organization, or other entity, or any individual, who or which, like a recipient, is not to engage in discriminatory acts with respect to applicable persons covered by this part, because of his or its direct or substantial participation in any program, such as a contractor, subcontractor, provider of employment, or user of facilities or services provided under any program.

§ 8.4 Discrimination prohibited.

(a) *General.* No person in the United States shall, on the ground of race, color, or national origin be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under, any program to which this part applies.

(b) *Specific discriminatory acts prohibited.* (1) A recipient of Federal financial assistance, or other party subject to this part under any program to which this part applies, shall not participate, directly or through contractual or other arrangements, in any act or course of conduct which, on the ground of race, color, or national origin:

(i) Denies to a person any service, financial aid, or other benefit provided under the program;

(ii) Provides any service, financial aid, or other benefit, to a person which is different, or is provided in a different manner, from that provided to others under the program;

(iii) Subjects a person to segregation or separate or other discriminatory treatment in any matter related to his receipt (or nonreceipt) of any such service, financial aid, property, or other benefit under the program.

(iv) Restricts a person in any way in the enjoyment of services, facilities, or any other advantage, privilege, property, or benefit provided to others under the programs;

(v) Treats a person differently from others in determining whether he satisfies any admission, enrollment, quota, eligibility, membership, or other requirement or condition which persons must meet in order to be provided any service, financial aid, or other benefit provided under the program;

(vi) Denies a person an opportunity to participate in the program through the provision of property or services or otherwise, or affords him an opportunity to do so which is different from that afforded others under the program (including the opportunity to participate in the program as an employee but only to the extent set forth in paragraph (c) of this section);

(vii) Denies a person the same opportunity or consideration given others to be selected or retained or otherwise to participate as a contractor, subcontractor, or subgrantee when a program is applicable thereto;

(viii) Denies a person the opportunity to participate as a member of a planning or advisory body which is an integral part of the program.

(2) A recipient, or other party subject to this part under any program, in determining the types of services, financial aid, or other benefits, or facilities which will be provided under any such program, or the class of persons to whom, or the situations in which, such services, financial aid, other benefits, or facilities will be provided under any such program, or the class of persons

to be afforded an opportunity to participate in any such program, shall not, directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting persons to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect any persons of a particular race, color, or national origin.

(3) In determining the site or location of facilities, a recipient or other party subject to this part may not make selections with the purpose or effect of excluding persons from, denying them the benefits of, or subjecting them to discrimination under any program to which this part applies, on the grounds of race, color or national origin; or with the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the Act or this part.

(4) As used in this section, the services, financial aid, or other benefits provided under a program receiving Federal financial assistance shall be deemed to include any service, financial aid, or other benefit provided or made available in or through or utilizing a facility provided with the aid of Federal financial assistance.

(5) The enumeration of specific forms of prohibited discrimination in this paragraph and paragraph (c) of this section does not limit the generality of the prohibition in paragraph (a) of this section.

(6)(i) In administering a program regarding which the recipient has previously discriminated against persons on the ground of race, color, or national origin, the recipient must take affirmative action to overcome the effects of prior discrimination.

(ii) Even in the absence of such prior discrimination, a recipient in administering a program may take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color or national origin.

(c) *Employment practices.* (1) Where a primary objective of the Federal financial assistance to a program to which this part applies is to provide employment, a recipient or other party subject to this part shall not, directly or through contractual or other arrangements, subject a person to discrimination on the ground of race, color, or national origin in its employment practices under such program (including recruitment or recruitment advertising, hiring, firing, upgrading, promotion, demotion, transfer, layoff, termination, rates of pay or other forms of compensation or benefits, selection for training or apprenticeship, use of facilities, and treatment of employees). Such recipients and other parties subject to this part shall take affirmative action to ensure that applicants are employed, and employees are treated during employment without regard to their race, color, or national origin. Such recipients and other parties subject to this part shall, as may be required by supplemental regulations, develop a written affirmative action program. The requirements applicable to construction employment under any such program shall be in addition to those specified in or pursuant to Part III of Executive Order 11246 or any Executive order which supersedes it. Federal financial assistance to programs under laws funded or administered by the Department which has as a primary objective the providing of employment include those set forth in Appendix A II of this part.

(2) Where a primary objective of the Federal financial assistance to a program to which this part applies is not to provide employment, but discrimination on the grounds of race, color, or national origin, in the employment practices of the recipient or other party subject to this part, tends, on the grounds of race, color, or national origin, to exclude persons from participating in, to deny them the benefits of, or to subject them to discrimination under any such program, the provisions of paragraph (c)(1) of this section shall apply to the employment practices of the recipient or other party subject to this part, to the extent necessary to assure equality of opportunity to, and nondiscriminatory treatment of such persons.

[38 FR 17938, July 5, 1973; 38 FR 23777, Sept. 4, 1973]

§ 8.5 Nondiscrimination clause.

(a) *Applicability*. Every application for, and every grant, loan, or contract authorizing approval of, Federal financial assistance to carry out a program and to provide a facility subject to this part, and every modification or amendment thereof, shall, as a condition to its approval and to the extension of any Federal financial assistance pursuant thereto, contain or be accompanied by an assurance that the program will be conducted in compliance with all requirements imposed by or pursuant to this part. The assurances shall be set forth in a nondiscrimination clause. The responsible Department official shall specify the form and contents of the nondiscrimination clause for each program as appropriate.

(b) *Contents.* Without limiting its scope or language in any way, a nondiscrimination clause shall contain, where determined to be appropriate, and in an appropriate form, reference to the following assurances, undertakings, and other provisions:

(1) That the recipient or other party subject to this part will not participate directly or indirectly in the discrimination prohibited by §8.4, including employment practices when a program covering such is involved.

(2) That when employment practices are covered, the recipient or other party subject to this part will (i) in all solicitations or advertisements for employees placed by or for the recipient, state that qualified applicants will receive consideration for employment without regard to race, color, or national origin; (ii) notify each labor union or representative of workers with which it has a collective bargaining agreement or other contract or understanding of the recipient's commitments under this section; (iii) post the nondiscrimination clause and the notice to labor unions in conspicuous places available to employees and applicants for employment; and (iv) otherwise comply with the requirements of §8.4(c).

(3) That in a program involving continuing Federal financial assistance, the recipient thereunder (i) will state that the program is (or, in the case of a new program, will be) conducted in compliance with all requirements imposed by or pursuant to this part, and (ii) will provide for such methods of administration for the program as are found by the responsible Department official to give reasonable assurance that all recipients of Federal financial assistance under such program and any other parties connected therewith subject to this part will comply with all requirements imposed by or pursuant to this part.

(4) That the recipient agrees to secure the compliance or to cooperate actively with the Department to secure the compliance by others with this part and the nondiscrimination clause as may be directed under an applicable program. For instance, the recipient may be requested by the responsible Department official to undertake and agree (i) to obtain or enforce or to assist and cooperate actively with the responsible Department official in obtaining or enforcing, the compliance of other recipients or of other parties subject to this part with the nondiscrimination required by this part; (ii) to insert appropriate nondiscrimination clauses in the respective contracts with or grants to such parties; (iii) to obtain and to furnish to the responsible Department official such information as he may require for the supervision or securing of such compliance; (iv) to carry out sanctions for noncompliance with the obligations imposed upon recipients and other parties subject to this part; and (v) to comply with such additional provisions as the responsible Department official deems appropriate to establish and protect the interests of the United States in the enforcement of these obligations. In the event that the cooperating recipient becomes involved in litigation with a noncomplying party as a result of such departmental direction, the cooperating recipient may request the Department to enter into such litigation to protect the interests of the United States.

(5) In the case of real property, structures or improvements thereon, or interests therein, which are acquired for a program receiving Federal financial assistance, or in the case where Federal financial assistance is provided in the form of a transfer of real property or interest therein from the Federal

Government, the instrument effecting or recording the transfer shall contain a covenant running with the land assuring nondiscrimination for the period during which the real property is used for a purpose for which the Federal financial assistance is extended or for another purpose involving the provision of similar services or benefits, or for as long as the recipient retains ownership or possession of the property, whichever, is longer. Where no transfer of property is involved, but property is improved with Federal financial assistance, the recipient shall agree to include such a covenant in any subsequent transfer of such property. Where the property is obtained from the Federal Government, such covenant may also include a condition coupled with a right to be reserved by the Department to revert title to the property in the event of a breach of the covenant where, in the discretion of the responsible Department official, such a condition and right of reverter is appropriate to the program under which the real property is obtained and to the nature of the grant and the grantee. In such event if a transferee of real property proposes to mortgage or otherwise encumber the real property as security for financing construction of new, or improvement of existing facilities on such property for the purposes for which the property was transferred, the responsible Department official may agree, upon request of the transferee and if necessary to accomplish such financing, and upon such conditions as he deems appropriate to forebear the exercise of such right to revert title for so long as the lien of such mortgage or other encumbrance remains effective.

(6) In programs receiving Federal financial assistance in the form, or for the acquisition, of real property or an interest in real property to the extent that rights to space on, over, or under any such property are included as part of the program receiving such assistance the nondiscrimination requirements of this part shall extend to any facility located wholly or in part in such space.

(7) That a recipient shall not take action that is calculated to bring about indirectly what this part forbids it to accomplish directly.

(8) Provisions specifying the extent to which like assurances will be required of subgrantees, contractors and subcontractors, lessees, transferees, successors in interest, and other participants in the program.

(9) Provisions which give the United States a right to seek judicial enforcement of the assurances.

(10) In the case where any assurances are required from an academic, a medical care, detention or correctional, or any other institution or facility, insofar as the assurances relate to the institution's practices with respect to the admission, care, or other treatment of persons by the institution or with respect to the opportunity of persons to participate in the receiving or providing of services, treatment, or benefits, such assurances shall be applicable to the entire institution or facility. That requirement may be waived by the responsible Department official if the party furnishing the assurances establishes to the satisfaction of the responsible Department official that the practices in designated parts or programs of the institution or facility will in no way affect its practices in the program of the institution or facility for which Federal financial assistance is or is sought to be provided, or affect the beneficiaries of or participants in such program. If in any such case the assistance is or is sought for the construction of a facility or part of a facility, the assurances shall in any event extend to the entire facility and to facilities operated in connection therewith.

(11) In the case where the Federal financial assistance is in the form of or to aid in the acquisition of personal property, or real property or interest therein or structures thereon, the assurance shall obligate the recipients, or, in the case of a subsequent transfer, the transferee, for the period during which the property is used for a purpose for which the Federal financial assistance is extended or for another purpose involving the provision of similar services and benefits, or for as long as the recipient or transferee retains ownership or possession of the property, whichever is longer. In the case of any

other type or form of assistance, the assurances shall be in effect for the duration of the period during which Federal financial assistance is extended to the program.

[38 FR 17938, July 5, 1973; 38 FR 23777, Sept. 4, 1973]

§ 8.6 Applicability of this part to Department assisted programs.

The following examples illustrate the applicability of this part to programs which receive or may receive Federal financial assistance administered by the Department. The fact that a particular program is not listed does not indicate that it is not covered by this part, The discrimination referred to is that described in §8.4 against persons on the ground of race, color, or national origin.

(a) *Assistance to support economic development programs.* Discrimination in which recipients and other parties subject to this part shall not engage, directly or indirectly, includes discrimination in (1) the letting of contracts or other arrangements for the planning, designing, engineering, acquisition, construction, rehabilitation, conversion, enlargement, installation, occupancy, use, maintenance, leasing, subleasing, sales, or other utilization or disposition of property or facilities purchased or financed in whole or in part with the aid of Federal financial assistance; (2) the acquisition of goods or services, or the production, preparation, manufacture, marketing, transportation, or distribution of goods or services in connection with a program or its operations; (3) the onsite operation of the project or facilities; (4) services or accommodations offered to the public in connection with the program; and (5) in employment practices in connection with or which affect the program (as defined in §8.4(c)); in the following programs:

(i) Any program receiving Federal financial assistance for the purchase or development of land and facilities (including machinery and equipment) for industrial or commercial usage.

(ii) Any program receiving Federal financial assistance in the form of loans or direct or supplementary grants for the acquisition or development of land and improvements for public works, public service or development facility usage, and the acquisition, construction, rehabilitation, alteration, expansion, or improvement of such facilities, including related machinery and equipment.

(iii) In any program receiving any form of technical assistance designed to alleviate or prevent conditions of excessive employment or underemployment.

(iv) In any program receiving Federal financial assistance in the form of administrative expense grants.

(b) *Assistance to support the training of students.* A current example of such assistance is that received by State maritime academies or colleges, by contract, of facilities (vessels), related equipment and funds to train merchant marine officers. In this and other student training programs, discrimination which is prohibited by recipients and other parties subject to this part includes discrimination in the selection of persons to be trained and in their treatment by the recipients in any aspect of the educational process and discipline during their training, or in the availability or use of any academic, housing, eating, recreational, or other facilities and services, or in financial assistance to students furnished or controlled by the recipients or incidental to the program. In any case where selection of trainees is made from a predetermined group, such as the students in an institution or area, the group must be selected without discrimination.

(c) *Assistance to support mobile or other trade fairs.* In programs in which operators of mobile trade fairs using U.S. flag vessels and aircraft and designed to exhibit and sell U.S. products abroad, or in which other trade fairs or exhibitions, receive technical and financial assistance, discrimination which is prohibited by recipients and other parties subject to this part includes discrimination in the selection or retention of any actual or potential exhibitors, or in access to or use of the services or accommodations by, or otherwise with respect to treatment of, exhibitors or their owners, officers, employees, or agents.

(d) *Assistance to support business entities eligible for trade adjustment assistance.* In programs in which eligible business entities receive any measure or kind of technical, financial or tax adjustment assistance because of or in connection with the impact of U.S. international trade upon such business, discrimination which is prohibited by recipients and other parties subject to this part includes discrimination in their employment practices as defined in §8.4(c).

(e) *Assistance to support research and development and related activities.* In programs in which individuals, educational or other institutions, public governmental or business entities receive Federal financial assistance in order to encourage or foster research or development activities as such, or to obtain, promote, develop, or protect thereby technical, scientific, environmental, or other information, products, facilities, resources, or services which are to be made available to or used by others; but where such programs do not constitute Government procurement of property or services, discrimination which is prohibited by recipients and other parties subject to this part includes discrimination with respect to (1) the choice, retention or treatment of contractors, subcontractors, subgrantees or of any other person; (2) the provision of services, facilities, or financial aid; (3) the participation of any party in the research activities; (4) the dissemination to or use by any person of the results or benefits of the research or development, whether in the form of information, products, services, facilities, resources, or otherwise. If research is performed within an educational institution under which it is expected that students or others will participate in the research as a part of their experience or training, on a compensated or uncompensated basis, there shall be no discrimination in admission of students to, or in their treatment by, that part of the school from which such students are drawn or in the selection otherwise of trainees or participants. The recipient educational institutions will be required to give the assurances provided in §8.5(b)(10).

(f) *Assistance to aid in the operations of vessels engaged in U.S. foreign commerce.* In programs in which the operators of American-flag vessels used to furnish shipping services in the foreign commerce of the United States receive Federal financial assistance in the form of operating differential subsidies, discrimination which is prohibited by recipients and other parties subject to this part includes discrimination in soliciting, accepting or serving in any way passengers or shippers of cargo entitled to protection in the United States under the Act.

Subpart B—General Compliance

§8.7 Cooperation, compliance reports and reviews and access to records.

(a) *Cooperation and assistance.* Each responsible Department official shall to the fullest extent practicable seek the cooperation of recipients and other parties subject to this part in obtaining compliance with this part and shall provide assistance and guidance to recipients and other parties to help them comply voluntarily with this part.

(b) *Compliance reports.* Each recipient and other party subject to this part shall keep such records and submit to the responsible Department official timely, complete, and accurate compliance reports at such times and in such form and containing such information as the responsible Department official may determine to be necessary to enable him to ascertain whether the recipient or such other party has complied or is complying with this part. In general, recipients should have available for the department racial and ethnic data showing the extent to which members of minority groups are beneficiaries of federally assisted programs. In the case of any program under which a primary recipient extends Federal financial assistance to any other recipient, or under which a recipient is obligated to obtain or to cooperate in obtaining the compliance of other parties subject to this part, such other recipients or other parties shall also submit such compliance reports to the primary recipient or recipients as may be necessary to enable them to carry out their obligations under this part.

(c) *Access to sources of information.* Each recipient or other party subject to this part shall permit access by the

responsible Department official or his designee during normal business hours to such of its books, records, accounts, and other sources of information, and its facilities, as may be pertinent to ascertain compliance with this part. Where any information required of a recipient or other party is in the exclusive possession of another who fails or refuses to furnish this information, the recipient or other party shall so certify in its report and shall set forth what efforts it has made to obtain the information.

(d) *Information to beneficiaries and participants.* Each recipient or other party subject to this part shall make available to participants, beneficiaries, and other interested persons such information regarding the provisions of this part and its applicability to the program under which the recipient receives Federal financial assistance, and make such information available to them in such manner as this part and the responsible Department official finds necessary to apprise such persons of the protections against discrimination assured them by the Act and this part.

(e) *Compliance review.* The responsible Department official or his designee shall from time to time review the practices of recipients and other parties subject to this part to determine whether they are complying with this part.

§ 8.8 Complaints.

(a) *Filing complaints.* Any person who believes himself or any specific class of persons to be subjected to discrimination prohibited by this part may by himself or by a representative file with the responsible Department official a written complaint. A complaint shall be filed not later than 180 days from the date of the alleged discrimination, unless the time for filing is extended by the responsible Department official.

§ 8.9 Intimidatory or retaliatory acts prohibited.

(a) No recipient or other party subject to this part shall intimidate, threaten, coerce, or discriminate against, any person for the purpose of interfering with any right or privilege secured by section 601 of the Act of this part, or because the person has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this part.

(b) The identity of complainants shall be kept confidential except to the extent necessary to carry out the purposes of this part, including the conduct of any investigation, hearing, or judicial or other proceeding arising thereunder.

§ 8.10 Investigations.

(a) *Making the investigation.* The responsible Department official or his designee will make a prompt investigation whenever a compliance review, report, complaint, or any other information indicates a possible failure to comply with this part. The investigation shall include, where appropriate, a review of the pertinent practices and policies of the recipient or other party subject to this part, the circumstances under which the possible noncompliance with this part occurred, and other factors relevant to a determination as to whether there has been a failure to comply with this part.

(b) *Resolution of matters.* (1) If an investigation pursuant to paragraph (a) of this section indicates a failure to comply with this part, the responsible Department official will so inform the recipient or other party subject to this part and the matter will be resolved by informal means whenever possible. If it has been determined that the matter cannot be resolved by informal means, action will be taken as provided for in § 8.11.

(2) If an investigation does not warrant action pursuant to paragraph (b)(1) of this section, the responsible Department official will so inform the recipient or other party subject to this part and the complainant, if any, in writing.

§ 8.11 Procedures for effecting compliance.

(a) *General.* If there appears to be a failure or threatened failure to comply with this part, and if the noncompliance or threatened noncompliance cannot be corrected by informal means,

compliance with this part may be effected by the suspension or termination of or refusal to grant or to continue Federal financial assistance or by any other means authorized by law. Such other means may include, but are not limited to, (1) a reference to the Department of Justice with a recommendation that appropriate proceedings be brought to enforce any rights of the United States under any law of the United States (including other titles of the Act), or any assurance or other contractural undertaking, and (2) any applicable proceeding under State or local law.

(b) *Noncompliance with §8.5.* If a recipient or other party subject to this part fails or refuses to furnish an assurance required under §8.5 or otherwise fails or refuses to comply with a requirement imposed by or pursuant to that section, Federal financial assistance may be refused in accordance with the procedures of paragraph (c) of this section. The Department shall not be required to provide assistance in such a case during the pendency of the administrative proceedings under said paragraph except that the Department shall continue assistance during the pendency of such proceedings where such assistance is due and payable pursuant to an application or contract therefor approved prior to the effective date of this part.

(c) *Termination of or refusal to grant or to continue Federal financial assistance.* No order suspending, terminating, or refusing to grant or continue Federal financial assistance shall become effective until (1) the responsible Department official has advised the recipient or other party subject to this part of his failure to comply and has determined that compliance cannot be secured by voluntary means, (2) there has been an express finding on the record, after opportunity for hearing, of a failure by such recipient or other party to comply with a requirement imposed by or pursuant to this part, (3) the action has been approved by the Secretary pursuant to §8.13(e), and (4) the expiration of 30 days after the Secretary has filed with the committee of the House and the committee of the Senate having legislative jurisdiction over the program involved, a full written report of the circumstances and the grounds for such action. Any action to suspend or terminate or to refuse to grant or to continue Federal financial assistance shall be limited to the particular political entity, or part thereof, or other recipient or other party as to whom such a finding has been made and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found.

(d) *Other means authorized by law.* No action to effect compliance by any other means authorized by law shall be taken until (1) the responsible Department official has determined that compliance cannot be secured by voluntary means, (2) the recipient or other party has been notified of its failure to comply and of the action to be taken to effect compliance, and (3) the expiration of at least 10 days from the mailing of such notice to the recipient or other party. During this period of at least 10 days additional efforts shall be made to persuade the recipient or other party to comply with this part and to take such corrective action as may be appropriate.

§8.12 Hearings.

(a) *Opportunity for hearing.* Whenever an opportunity for a hearing is required by §8.11(c), reasonable notice shall be given by registered or certified mail, return receipt requested, to the affected recipient or other party subject to this part. This notice shall advise the recipient or other party of the action proposed to be taken, the specific provision under which the proposed action against it is to be taken, and the matters of fact or law asserted as the basis for this action, and either (1) fix a date not less than 20 days after the date of such notice within which the recipient or other party may request of the responsible Department official that the matter be scheduled for hearing, or (2) advise the recipient or other party that the matter in question has been set down for hearing at a stated place and time. The time and place so fixed shall be reasonable and shall be subject to change for cause. The complainant, if any, shall be advised of the time and place of the hearing. A recipient or other party may

waive a hearing and submit written information and argument for the record. The failure of a recipient or other party to request a hearing under this paragraph of this section or to appear at a hearing for which a date has been set shall be deemed to be a waiver of the right to a hearing under section 602 of the Act and § 8.11(c) and consent to the making of a decision on the basis of such information as is available.

(b) *Time and place of hearing.* Hearings shall be held at the offices of the Department in Washington, D.C., at a time fixed by the responsible Department official or hearing officer unless he determines that the convenience of the recipient or other party or of the Department requires that another place be selected. Hearings shall be held before the responsible Department official, or at his discretion, before a hearing officer.

(c) *Right to counsel.* In all proceedings under this section, the recipient or other party and the Department shall have the right to be represented by counsel.

(d) *Procedures, evidence, and record.* (1) The hearing, decision, and any administrative review thereof shall be conducted in conformity with 5 U.S.C. 554–557 (sections 5–8 of the Administrative Procedures Act), and in accordance with such rules of procedure as are proper (and not inconsistent with this section) relating to the conduct of the hearing, giving of notices subsequent to those provided for in paragraph (a) of this section, taking of testimony, exhibits, arguments and briefs, requests for findings, and other related matters. Both the Department and the recipient or other party shall be entitled to introduce all relevant evidence on the issues as stated in the notice for hearing or as determined by the officer conducting the hearing at the outset of or during the hearing.

(2) Technical rules of evidence shall not apply to hearings conducted pursuant to this part, but rules or principles designed to assure production of the most credible evidence available and to subject testimony to test by cross-examination shall be applied where reasonably necessary by the officer conducting the hearing. The hearing officer may exclude irrelevant, immaterial, or unduly repetitious evidence. All documents and other evidence offered or taken for the record shall be open to examination by the parties and opportunity shall be given to refute facts and arguments advanced on either side of the issues. A transcript shall be made of the oral evidence except to the extent the substance thereof is stipulated for the record. All decisions shall be based upon the hearing record and written findings shall be made.

(e) *Consolidated or joint hearings.* In cases in which the same or related facts are asserted to constitute noncompliance with this part with respect to two or more programs to which this part applies, or noncompliance with this part and the regulations of one or more other Federal departments or agencies issued under Title VI of the Act, the Secretary may, by agreement with such other departments or agencies where applicable, provide for the conduct of consolidated or joint hearings and for the application to such hearings of rules of procedures not inconsistent with this part. Final decisions in such cases, insofar as this part is concerned, shall be made in accordance with § 8.13.

§ 8.13 Decisions and notices.

(a) *Decision by person other than the responsible Department official.* If the hearing is held by a hearing officer such hearing officer shall either make an initial decision, if so authorized, or certify the entire record including his recommended findings and proposed decision to the responsible Department official for a final decision, and a copy of such initial decision or certification shall be mailed to the recipient or other party subject to this part. Where the initial decision is made by the hearing officer, the recipient or other party may within 30 days of the mailing of such notice of initial decision file with the responsible Department official his exceptions to the initial decision, with his reasons therefor. In the absence of exceptions, the responsible Department official may on his own motion within 45 days after the initial decision serve on the recipient or other party a notice that he will review the decision. Upon the filing of such exceptions or of such notice of review, the

responsible Department official shall review the initial decision and issue his own decision thereon including the reasons therefor. In the absence of either exceptions or a notice of review the initial decision shall constitute the final decision of the responsible Department official.

(b) *Decisions on record or review by the responsible Department official.* Whenever a record is certified to the responsible Department official for decision or he reviews the decision of a hearing officer pursuant to paragraph (a) of this section, or whenever the responsible Department official conducts the hearing, the recipient or other party shall be given reasonable opportunity to file with him briefs or other written statements of its contentions, and a copy of the final decision of the responsible Department official shall be given in writing to the recipient or other party and to the complainant, if any.

(c) *Decisions on record where a hearing is waived.* Whenever a hearing is waived pursuant to § 8.12(a) a decision shall be made by the responsible departmental official on the record and a copy of such decision shall be given in writing to the recipient or other party, and to the complainant, if any.

(d) *Ruling required.* Each decision of a hearing officer or responsible Department official shall set forth his ruling on each finding, conclusion, or exception presented, and shall identify the requirement or requirements imposed by or pursuant to this part with which it is found that the recipient or other party has failed to comply.

(e) *Approval by Secretary.* Any final decision of a responsible Department official (other than the Secretary) which provides for the suspension or termination of, or the refusal to grant or continue, Federal financial assistance, or the imposition of any other sanction available under this part of the Act, shall promptly be transmitted to the Secretary, who may approve such decision, may vacate it, or remit or mitigate any sanction imposed.

(f) *Content of orders.* The final decision may provide for suspension or termination of, or refusal to grant or continue, Federal financial assistance, in whole or in part, under the program involved, and may contain such terms, conditions, and other provisions as are consistent with and will effectuate the purposes of the Act and this part, including provisions designed to assure that no Federal financial assistance will thereafter be extended under such program to the recipient or other party determined by such decision to be in default in its performance of an assurance given by it pursuant to this part, or to have otherwise failed to comply with this part, unless and until it corrects its noncompliance and satisfies the responsible Department official that it will fully comply with this part.

(g) *Posttermination proceedings.* (1) Any recipient or other party which is adversely affected by an order issued under paragraph (f) of this section shall be restored to full eligibility to receive Federal financial assistance if it satisfies the terms and conditions of that order for such eligibility or if it brings itself into compliance with this part and provides reasonable assurance that it will fully comply with this part.

(2) Any recipient or other party adversely affected by an order entered pursuant to paragraph (f) of this section may at any time request the responsible Department official to restore fully its eligibility to receive Federal financial assistance. Any such request shall be supported by information showing that the recipient or other party has met the requirements of paragraph (g)(1) of this section. If the responsible Department official determines that those requirements have been satisfied, he shall restore such eligibility.

(3) If the responsible Department official denies any such request, the recipient or other party may submit a request for a hearing in writing, specifying why it believes such official to have been in error. It shall thereupon be given an expeditious hearing, with a decision on the record in accordance with rules of procedure issued by the responsible Department official. The recipient or other party will be restored to such eligibility if it proves at such a hearing that it satisfied the requirements of paragraph (g)(1) of this section. While proceedings under this paragraph are pending, the sanctions imposed by the order issued under

paragraph (f) of this section shall remain in effect.

§ 8.14 Judicial review.

Action taken pursuant to section 602 of the Act is subject to judicial review as provided in section 603 of the Act.

§ 8.15 Effect on other laws; supplementary instructions; coordination.

(a) *Effect on other laws.* All regulations, orders, or like directions heretofore issued by any officer of the Department which impose requirements designed to prohibit any discrimination against individuals on the ground of race, color, or national origin under any program to which this part applies, and which authorizes the suspension or termination of or refusal to grant or to continue Federal financial assistance to any recipient or other party subject to this part of such assistance under such program for failure to comply with such requirements, are hereby superseded to the extent that such discrimination is prohibited by this part, except that nothing in this part shall be deemed to relieve any one of any obligations assumed or imposed under any such superseded regulation, order, instruction, or like direction prior to January 9, 1965. Nothing in this part, however, shall be deemed to supersede any of the following (including future amendments thereof):

(1) Executive Order 11246 and regulations issued thereunder, or

(2) Executive Order 11063 and regulations issued thereunder, or any other regulations or instructions, insofar as such order, regulations, or instructions prohibit discrimination on the ground of race, color, or national origin in any program or situation to which this part is inapplicable, or prohibit discrimination on any other ground.

(b) *Forms and instructions.* Each responsible Department official shall issue and promptly make available to interested parties forms and detailed instructions and procedures for effectuating this part as applied to programs to which this part applies and for which he is responsible.

(c) *Supervision and coordination.* The Secretary may from time to time assign to officials of the Department, or to officials of other departments or agencies of the Government with the consent of such departments or agencies, responsibilities in connection with the effectuation of the purposes of title VI of the Act and this part (other than responsibility for final decision as provided in § 8.13), including the achievement of effective coordination and maximum uniformity within the Department and within the executive branch of the government in the application of title VI and this part to similar programs and in similar situations. Any action taken, determination made, or requirement imposed by an official of another Department or agency acting pursuant to an assignment of responsibility under this paragraph shall have the same effect as though such action had been taken by the responsible official of this Department.

APPENDIX A TO PART 8—PROGRAMS COVERED BY TITLE VI

I. FEDERAL FINANCIAL ASSISTANCE TO WHICH TITLE 15, SUBTITLE A, PART 8 APPLIES

Economic Development Administration

1. Loans, grants, technical and other assistance for public works and development facilities, for supplementing Federal grants-in-aid, for private businesses, and for other purposes, including assistance in connection with designated economic development districts and regions (Public Works and Economic Development Act of 1965, as amended, 42 U.S.C. 3121 *et seq.*).

2. Financial and technical assistance to firms to aid economic adjustment to the effects of increased imports in direct competition with firm products (Trade Act of 1974, 19 U.S.C. 2341–2354).

3. Assistance to communities adversely affected by increased imports in direct competition with products manufactured in the community area (Trade Act of 1974, 19 U.S.C. 2371–2374).

4. Assistance to projects involving construction of local and State public facilities in order to reduce unemployment and provide State and local governments with badly needed public facilities (Local Public Works Capital Development and Assistance Act of 1976, 42 U.S.C. 6701–6710).

5. Trade adjustment assistance: Loans, dissemination of technical information (title II of the Trade Act of 1974, 19 U.S.C. 2341–2374).

Maritime Administration

1. Operating differential subsidy assistance to operators of U.S. flag vessels engaged in U.S. foreign commerce (46 U.S.C. 1171 *et seq.*).

2. Assistance to operate State maritime academies and colleges to train merchant marine officers (46 U.S.C. 1381–1388).

3. Ship construction differential subsidies, direct payments (Merchant Marine Act of 1936, as amended, 46 U.S.C. 1151–1161).

National Bureau of Standards

1. Grants to universities and other research organizations for fire research and safety programs (15 U.S.C. 278f).

National Fire Prevention and Control Administration

1. Academy planning assistance: To assist States in the development of training and education in the fire prevention and control area (15 U.S.C. 2201–2219).

2. State fire incident reporting assistance: To assist States in the establishment and operation of a statewide fire incident and casualty reporting system (15 U.S.C. 2201–2219).

3. Public education assistance planning: Publications, audiovisual presentations and demonstrations, research, testing, and experimentation to determine the most effective means for such public education (15 U.S.C. 2205c).

4. Policy development assistance: Studies of the operations and management aspects of fire services (15 U.S.C. 2207c).

National Oceanic and Atmospheric Administration

1. Assistance to States, educational institutions, and the commercial fishing industry for the development of tuna and other latent fisheries (16 U.S.C. 758e).

2. Assistance to States for the development and implementation of programs to protect and study certain species of marine mammals (16 U.S.C. 1379b).

3. Financial assistance to States with agencies which have entered into a cooperative agreement to assist in the preservation of threatened and endangered species (16 U.S.C. 1535).

4. Assistance to coastal States for the development of estuarine sanctuaries to serve as field laboratories and for acquiring access to public beaches (16 U.S.C. 1461).

5. Assistance to coastal States for the development, implementation, and administration of coastal zone management programs (16 U.S.C. 1454–1455).

6. Assistance to coastal States to help communities in dealing with the economic, social, and environmental consequences resulting from expanded coastal energy activity (16 U.S.C. 1456).

7. Authority to enter into cooperative agreements with ''colleges and universities, with game and fish departments of the several States, and with nonprofit organizations relating to cooperative research units.'' Assistance limited to assignment of personnel, supplies, and incidental expenses (16 U.S.C. 753 a and b).

8. Grants for education and training of personnel in the field of commercial fishing, ''to public and nonprofit private universities and colleges * * *'' (16 U.S.C. 760d).

9. Grants for ''office and any other necessary space'' for the Northern Pacific Halibut Commission (16 U.S.C. 772).

10. The ''Dingell Johnson Act'': Apportionment of dollars to States for restoration and management of sport or recreational species (16 U.S.C. 777–777i; 777k).

11. Authority to cooperate with and provide assistance to States in controlling jellyfish, etc. (16 U.S.C. 1201, 1202).

12. Authority to cooperate with and provide assistance to certain States and territories in the study and control of ''Crown of Thorns'' starfish (16 U.S.C. 1211–1213).

13. Technical assistance to fishing cooperatives regarding catching and marketing aquatic products (15 U.S.C. 521–522).

14. Fish research and experimentation program cooperation with other agencies in acquisition of lands, construction of buildings, employment of personnel in establishing and maintaining research stations (16 U.S.C. 778a).

15. Assistance to upgrade commercial fishing vessels and gear (16 U.S.C. 742c).

16. Assistance to State projects designed for the research and development of commercial fisheries resources of the nation (16 U.S.C. 779a–779f).

17. Assistance to State and other non-Federal interests under cooperative agreements to conserve, develop, and enhance anadromous and Great Lakes Fisheries (16 U.S.C. 757a *et seq.*).

18. Grants and other assistance under the National Sea Grant College and Program Act of 1966: To support establishment of major university centers for marine research, education, training, and advisory services (33 U.S.C. 1121–1124).

19. Geodetic surveys and services; advisory services; dissemination of technical information (33 U.S.C. 883a).

20. Nautical charts assistance; advisory services; dissemination of technical information (33 U.S.C. 883a).

21. River and flood forecast and warning services; advisory services (15 U.S.C. 313).

22. Weather forecast and warning services (15 U.S.C. 311 and 313, 49 U.S.C. 1351 and 1463).

23. Commercial fisheries disaster assistance (16 U.S.C. 779b).

24. Provision for the Weather Service to assist in joint projects ''of mutual interest'' (15 U.S.C. 1525).

National Telecommunications and Information Administration

1. Grants for the planning and construction of public telecommunications facilities for

the production and distribution of noncommercial educational and cultural radio and television programming and related instructional and informational materials. (Public Telecommunications Financing Act of 1978, 47 U.S.C. Sections 390–394).

Office of Minority Business Enterprise

1. Assistance to minority business enterprises: Grants, contracts, advisory service, technical information (15 U.S.C. 1512; title III of the Public Works and Economic Development Act of 1965, as amended, 42 U.S.C. 3151; Executive Order 11625, Oct. 13, 1971).

Regional Action Planning Commissions

1. Supplemental grants to Federal grant-in-aid programs and technical assistance funds for planning, investigations, studies, training programs, and demonstration projects, including demonstrations in energy, transportation, health and nutrition, education and indigenous arts and crafts (title V of the Public Works and Economic Development Act of 1965, as amended, 42 U.S.C. 3181–3196).

United States Travel Service

1. Assistance to strengthen the domestic and foreign commerce of the United States, and to promote friendly understanding and appreciation of the United States by encouraging foreign residents to visit the United States (22 U.S.C. 2121 *et seq.*).

Departmentwide

1. Authority to make basis scientific research grants (42 U.S.C. 1891–1893; to be superseded no later than Feb. 3, 1979, by the Federal Grant and Cooperative Agreement Act of 1977, Pub. L. 95–224).

II. A PRIMARY OBJECTIVE OF THE FINANCIAL ASSISTANCE AUTHORIZED BY THE FOLLOWING STATUTES, ALREADY LISTED ABOVE IN APPENDIX AI, IS TO PROVIDE EMPLOYMENT

1. Public Works and Economic Development Act of 1965, as amended (42 U.S.C. 3121 *et seq.*).

2. Trade Act of 1974 (19 U.S.C. 2341–2354).

3. Local Public Works Capital Development and Assistance Act of 1976 (42 U.S.C. 6701–6710)

[43 FR 49303, Oct. 23, 1978, as amended at 44 FR 12642, Mar. 8, 1979]

PART 8a—[RESERVED]

PART 8b—PROHIBITION OF DISCRIMINATION AGAINST THE HANDICAPPED IN FEDERALLY ASSISTED PROGRAMS OPERATED BY THE DEPARTMENT OF COMMERCE

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8b.26 Procedures.

AUTHORITY: 29 U.S.C. 794.

SOURCE: 47 FR 17746, Apr. 23, 1982, unless otherwise noted.

Subpart A—General Provisions

§8b.1 Purpose.

Section 504 of the Rehabilitation Act of 1973, as amended, prohibits discrimination on the basis of handicap in any program or activity receiving or benefiting from Federal financial assistance. The purpose of this part is to implement section 504 with respect to programs and activities receiving or benefiting from Federal financial assistance from the Department of Commerce.

§8b.2 Application.

This part applies to each recipient of Federal financial assistance from the Department of Commerce and to each program receiving or benefiting from such assistance. The requirements of this part do not apply to the ultimate beneficiaries of Federal financial assistance in the program receiving Federal financial assistance.

§8b.3 Definitions.

As used in this part, the term:

(a) *The Act* means the Rehabilitation Act of 1973, Pub. L. 93–112, as amended by the Rehabilitation Act Amendments of 1974, Pub. L. 93–516, and by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, Pub. L. 95–602 (codified at 29 U.S.C. 794 (1976 & Supp. II 1978)).

(b) *Applicant for assistance* means one who submits an application, request, or plan required to be approved by a Department official or by a recipient as a condition to becoming a recipient.

(c) *Department* means the Department of Commerce and any of its constituent units authorized to provide Federal financial assistance.

(d) *Facility* means all or any portion of buildings, ships, structures, equipment, roads, walks, parking lots, industrial parks, or other real or personal property or interest in such property.

(e) *Federal financial assistance* means any grant, loan, contract (other than a procurement contract or a contract of insurance or guarantee), or any other arrangement by which the Department provides or otherwise makes available assistance in the form of:

(1) Funds;

(2) Services of Federal personnel; or

(3) Real and personal property or any interest in or use of such property, including:

(i) Transfers or leases of such property for less than fair market value or for reduced consideration; and

(ii) Proceeds from a subsequent transfer or lease of such property if the Federal share of its fair market value is not returned to the Federal Government.

(f) *Handicap* means any condition or characteristic that renders a person a handicapped person as defined in paragraph (g) of this section.

(g) ''Handicapped person.''

(1) *Handicapped person* means any person who:

(i) Has a physical or mental impairment which substantially limits one or more major life activities;

(ii) Has a record of such an impairment; or

(iii) Is regarded as having such an impairment.

(2) For purposes of employment, the term ''handicapped person'' does not include any person who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents that individual from performing the duties of the job in question, or whose employment, because of current alcohol or drug abuse, would constitute a direct threat to property or to the safety of others.

(3) As used in paragraph (g)(1) of this section, the phrase:

(i) *Physical or mental impairment* means:

(A) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine; or

(B) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities;

(C) The term ''physical or mental impairment'' includes, but is not limited

to, such diseases and conditions as orthopedic, visual speech and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, drug addiction and alcoholism.

(ii) *Major life activities* means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, working, and receiving education or vocational training.

(iii) *Has a record of such an impairment* means that the individual has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(iv) *Is regarded as having an impairment* means that the individual:

(A) Has a physical or mental impairment that does not substantially limit major life activities, but that is treated by a recipient as constituting such a limitation;

(B) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

(C) Has none of the impairments defined in paragraph (g)(3)(i) of this section, but is treated by a recipient as having such an impairment.

(h) *Qualified handicapped person* means:

(1) With respect to employment, a handicapped person who, with reasonable accommodation, can perform the essential functions of the job in question;

(2) With respect to post secondary and vocational education services, a handicapped person who meets the academic and technical standards requisite to admission or participation in the recipient's education program or activity;

(3) With respect to other services, a handicapped person who meets the essential eligibility requirements for the receipt of such services.

(i) *Recipient* means any State or its political subdivisions, any instrumentality of a State or its political subdivisions, any public or private agency, institution, organization, or other entity, or any person to which Federal financial assistance is extended directly or indirectly through another recipient, or including any successor, assignee, or transferee of a recipient, but excluding the ultimate beneficiary of the assistance.

(j) *Secretary* means the Secretary of Commerce, U.S. Department of Commerce.

(k) *Section 504* means section 504 of the Act.

(l) *Small recipient* means a recipient who serves fewer than 15 beneficiaries and who employs fewer than 15 employees at all times during a grant year.

§ 8b.4 Discrimination prohibited.

(a) *General.* No qualified handicapped individual shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity that receives or benefits from Federal financial assistance.

(b) *Discriminatory actions prohibited.* (1) A recipient, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of handicap:

(i) Deny a qualified handicapped individual the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified handicapped individual an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

(iii) Provide a qualified handicapped individual with any aid, benefit, or service that is not as effective as that provided to others;

(iv) Provide different or separate aid, benefits, or services to handicapped individuals or to any class of handicapped individuals, unless such action is necessary to provide qualified handicapped individuals with aid, benefits, or services that are as effective as those provided to others;

(v) Aid or perpetuate discrimination against a qualified handicapped individual by providing significant assistance to an agency, organization, or person that discriminates on the basis

of handicap in providing any aid, benefit, or service to beneficiaries of the recipient's program;

(vi) Deny a qualified handicapped individual the opportunity to participate as a member of planning or advisory boards; or

(vii) Otherwise limit a qualified handicapped individual in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving any aid, benefits, or services.

(2) For purposes of this part, aid, benefits, and services must afford handicapped individuals an equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as afforded to others, in the most integrated setting appropriate to the individual's needs. However, aid, benefits and services, to be equally effective, need not produce the identical result or level of achievement for handicapped and nonhandicapped individuals.

(3) A recipient may not deny a qualified handicapped individual the opportunity to participate in its regular programs or activities, despite the existence of separate or different programs or activities which are established in accordance with this part.

(4) A recipient may not, directly or through contractual or other arrangements, use criteria or methods of administration:

(i) That have the effect of subjecting qualified handicapped individuals to discrimination on the basis of handicap;

(ii) That have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the recipient's program with respect to handicapped individuals; or

(iii) That perpetuate the discrimination of another recipient if both recipients are subject to common administrative control or are agencies of the same state.

(5) In determining the geographic site or location of a facility, an applicant for assistance or a recipient may not make selections:

(i) That have the effect of excluding handicapped individuals from, denying them the benefit of, or otherwise subjecting them to discrimination under any program or activity that receives or benefits from Federal financial assistance; or

(ii) That have the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the program or activity with respect to handicapped individuals.

(6) As used in this section, the aid, benefit, or service provided under a program or activity receiving or benefiting from Federal financial assistance includes any aid, benefit, or service provided in or through a facility that has been constructed, expanded, altered, leased, rented or otherwise acquired, in whole or in part, with Federal financial assistance.

(7)(i) In providing services under programs of Federal financial assistance, recipients to which this subpart applies, except small recipients, shall ensure that no handicapped participant is denied the benefits of, excluded from participation in, or otherwise subjected to discrimination under the program or activity operated by the recipient because of the absence of auxiliary aids for participants with impaired sensory, manual or speaking skills. A recipient shall operate each program or activity to which this subpart applies so that, when viewed in its entirety, auxiliary aids are readily available. The Secretary may require small recipients to provide auxiliary aids in order to ensure that no handicapped participant is denied the benefits of, excluded from participation in, or otherwise subjected to discrimination under the program or activity operated by small recipients, when this would not significantly impair the ability of the small recipient to provide benefits or services.

(ii) Auxiliary aids may include brailled and taped materials, interpreters, telecommunications devices, or other equally effective methods of making orally delivered information available to persons with hearing impairments, readers for persons with visual impairments, equipment adapted for use by persons with manual impairments, and other similar devices and actions. Recipients need not provide attendants, individually prescribed devices, readers for personal use or study, or other devices or services of a personal nature.

(c) *Programs limited by Federal law.* The exclusion of non-handicapped persons from the benefits of a program limited by Federal statute or Executive order to handicapped individuals, or the exclusion of a specific class of handicapped individuals from a program limited by Federal statute or Executive order to a different class of handicapped individuals is not prohibited by this part.

(d) *Integrated setting.* Recipients shall administer programs and activities in the most integrated setting appropriate to the needs of qualified handicapped individuals.

(e) *Communications with individuals with impaired vision and hearing.* Recipients shall ensure that communications with their applicants, employees and beneficiaries are available to persons with impaired vision or hearing. Appropriate modes of communication may include braille, enlarged type, sign language and telecommunications devices.

§ 8b.5 Assurances required.

(a) *Assurances.* An applicant for Federal financial assistance for a program or activity to which this part applies shall submit an assurance, on a form specified by the Secretary, that the program will be operated in compliance with this part. An applicant may incorporate these assurances by reference in subsequent applications to the Department.

(b) *Duration of obligation.* (1) In the case of Federal financial assistance extended in the form of real property or structures on the property, the assurance will obligate the recipient or, in the case of a subsequent transfer, the transferee, for the period during which the real property or structures are used for the purpose for which Federal financial assistance is extended, or for another purpose involving the provision of similar services or benefits.

(2) In case of Federal financial assistance extended to provide personal property, the assurance will obligate the recipient for the period during which it retains ownership or possession of the property.

(3) In all other cases, the assurance will obligate the recipient for the period during which Federal financial assistance is extended or the federally-funded program is operated, whichever is longer.

(c) *Covenants.* (1) Where Federal financial assistance is provided in the form of real property or interest in the property from the Department, the instrument effecting or recording this transfer shall contain a covenant running with the land to assure nondiscrimination for the period during which the real property is used for a purpose for which the Federal financial assistance is extended or for another purpose involving the provision of similar services or benefits.

(2) Where no transfer or property is involved but property is purchased or improved with Federal financial assistance, the recipient shall agree to include the covenant described in paragraph (c)(1) of this section in the instrument effecting or recording any subsequent transferee of the property.

(3) Where Federal financial assistance is provided in the form of real property or interest in the property from the Department, the covenant shall also include a condition coupled with a right to be reserved by the Department to revert title to the property in the event of a breach of the covenant. If a transferee of real property proposed to mortgage or otherwise encumber the real property as security to finance construction of new, or improvement of existing, facilities on the property for the purposes for which the property was transferred, the Secretary may agree to forbear the exercise of such right to revert title for so long as the lien of such mortgage or other encumbrance remains effective. Such an agreement by the Secretary may be entered into only upon the request of the transferee (recipient) if it is necessary to accomplish such financing and upon such terms and conditions as the Secretary deems appropriate.

(d) *Interagency agreements.* Where funds are granted by the Department to another Federal agency to carry out a program under a law administered by the Department, and where the grant obligates the recipient agency to comply with the rules and regulations of the Department applicable to that grant the provisions of this part shall

apply to programs and activities operated with such funds.

§8b.6 Remedial action, voluntary action, and self-evaluation.

(a) *Remedial action.* (1) If the Secretary finds that a recipient has discriminated against persons on the basis of handicap in violation of section 504 or this part, the recipient shall take such remedial action as the Secretary deems necessary to overcome the effects of the discrimination.

(2) Where a recipient is found to have discriminated against persons on the basis of handicap in violation of section 504 or this part and where another recipient exercises control over the recipient that has discriminated, the Secretary, where appropriate, may require either or both recipients to take remedial action.

(3) The Secretary may, where necessary to overcome the effects of discrimination in violation of section 504 or this part, require a recipient to take remedial action:

(i) With respect to handicapped individuals who would have been participants in the program had the discrimination not occurred; and

(ii) With respect to handicapped persons who are no longer participants in the recipient's program, but who were participants in the program when the discrimination occurred; and

(iii) with respect to employees and applicants for employment.

(b) *Voluntary action.* A recipient may take steps, in addition to any action that is required by this part, to overcome the effects of conditions that resulted in limited participation in the recipient's program or activity by qualified handicapped individuals.

(c) *Self-evaluation.* (1) A recipient shall, within one year of the effective date of this part:

(i) Evaluate, with the assistance of interested persons, including handicapped individuals or organizations representing handicapped individuals, its current policies and practices and the effects thereof that do not or may not meet the requirements of this part;

(ii) Modify, after consultation with interested persons, including handicapped individuals or organizations representing handicapped individuals, any policies and practices that do not meet the requirements of this part; and

(iii) Take, after consultation with interested persons, including handicapped individuals or organizations representing handicapped individuals, appropriate remedial steps to eliminate the effects of any discrimination that resulted from adherence to these policies and practices.

(2) A recipient, other than a small recipient, shall for at least three years following completion of the evaluation required under paragraph (c)(1) of this section, maintain on file, make available for public inspection, and provide to the Secretary upon request:

(i) A list of the interested persons consulted;

(ii) A description of areas examined and any problems identified; and

(iii) A description of any modifications made and of any remedial steps taken.

(3) The Secretary may, as he or she deems necessary, direct recipients to conduct additional self-evaluations, in accordance with the requirements of paragraph (c)(1) of this section.

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[47 FR 17746, Apr. 23, 1982, as amended at 47 FR 35472, Aug. 16, 1982]

§8b.7 Designation of responsible employee and adoption of grievance procedures.

(a) *Designation of responsible employee.* A recipient, other than a small recipient, shall designate at least one person to coordinate its efforts to comply with this part.

(b) *Adoption of grievance procedures.* A recipient, other than a small recipient, shall adopt grievance procedures that incorporate appropriate due process standards and that provide for the prompt and equitable resolution of complaints alleging any action prohibited by this part. Such procedures need not be established with respect to complaints from applicants for employment or from applicants for admission to post secondary educational institutions.

§ 8b.8 Notice.

(a) A recipient, other than a small recipient, shall take appropriate initial and continuing steps to notify participants, beneficiaries, applicants and employees, including those with impaired vision or hearing, and unions or professional organizations holding collective bargaining or professional agreements with the recipient, that it does not discriminate on the basis of handicap in violation of Section 504 and of this part. The notification shall state, where appropriate, that the recipient does not discriminate in the admission or access to, or treatment or employment in, its programs and activities. The notification shall also include an identification of the responsible employee designated pursuant to § 8b.7(a). A recipient shall make the initial notification required by this paragraph within 90 days of the effective date of this part. Methods of initial and continuing notification may include the posting of notices, publications in newspapers and magazines, placement of notices in recipient's publications, and distribution of memoranda or other written communication. A recipient shall take appropriate steps to ensure that notice is available to persons with impaired vision or hearing.

(b) If a recipient publishes or uses recruitment materials or publications containing general information made available to participants, beneficiaries, applicants, or employees, it shall include in those materials or publications a statement of the policy described in paragraph (a) of this section. A recipient may meet the requirement of this paragraph either by including appropriate inserts in existing materials and publications, or by revising and reprinting the materials and publications.

§ 8b.9 Administrative requirements for small recipients.

The Secretary may require small recipients to comply with §§ 8b.7 and 8b.8, in whole or in part, when the Secretary finds a violation of this part or finds that such compliance will not significantly impair the ability of the small recipient to provide benefits or services.

§ 8b.10 Effect of state or local law or other requirements and effect of employment opportunities.

(a) The obligation to comply with this part is not obviated or alleviated by the existence of any state or local law or other requirement that, on the basis of handicap, imposes prohibitions or limits upon the eligibility of qualified handicapped individuals to receive services, participate in programs, or practice any occupation or profession.

(b) The obligation to comply with this part is not obviated or alleviated because employment opportunities in any occupation or profession are or may be more limited for handicapped individuals than for nonhandicapped persons.

Subpart B—Employment Practices

§ 8b.11 Discrimination prohibited.

(a) *General.* (1) No qualified handicapped individual shall, on the basis of handicap, be subjected to discrimination in employment under any program or activity that receives or benefits from Federal financial assistance.

(2) A recipient shall make all decisions concerning employment under any program or activity to which this part applies in a manner which ensures that discrimination on the basis of handicap does not occur and may not limit, segregate, or classify applicants or employees in any way that adversely affects their opportunities or status because of handicap.

(3) A recipient may not participate in a contractual or other relationship that has the effect of subjecting qualified handicapped applicants or employees to discrimination prohibited by this subpart. The relationships referred to in this subparagraph include relationships with employment and referral agencies, with labor unions, with organizations providing or administering fringe benefits to employees of the recipient, and with organizations providing training and apprenticeship programs.

(b) *Specific activities.* The prohibition against discrimination in employment applies to the following activities:

(1) Recruitment, advertising and the processing of applicants for employment;

(2) Hiring, upgrading, promotion, award of tenure, demotion, transfer, layoff, termination, right of return from layoff and rehiring;

(3) Rates of pay or any other form of compensation and changes in compensation; pension or other benefit the applicant or employee receives from any other source.

§8b.12 Reasonable accommodation.

(a) A recipient shall make reasonable accommodation to the known physical or metal limitations of an otherwise qualified handicapped applicant or employee unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program.

(b) Reasonable accommodation may include:

(1) Making the facilities used by the employees in the area where the program is conducted, including common areas used by all employees such as hallways, restrooms, cafeterias and lounges, readily accessible to and usable by handicapped persons; and

(2) Job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, the provision of readers or interpreters, and other similar actions.

(c) In determining pursuant to paragraph (a) of this section whether an accommodation would impose an undue hardship on the operation of a recipient's program, factors to be considered include:

(1) The overall size of the recipient's program with respect to number of employees, number of participants, number and type of facilities, and size of budget;

(2) The type of the recipient's operation, including the composition and structure of the recipient's workforce; and

(3) The nature and cost of the accommodation needed.

(d) A recipient may not deny any employment opportunity to a qualified handicapped employee or applicant if the basis for the denial is the need to make reasonable accommodation to the physical or mental limitations of the employee or applicant.

(e) Nothing in this paragraph shall relieve a recipient of its obligation to make its program accessible as required in subpart C of this part, or to provide auxiliary aids, as required by §8b.4(b)(7).

§8b.13 Employment criteria.

(a) A recipient may not make use of any employment test or other selection criterion that screens out or tends to screen out handicapped individuals or any class of handicapped individuals unless;

(1) The test score or other selection criterion, as used by the recipient, is shown to be job-related for the position in question; and

(2) Alternative job-related tests or criteria that do not screen out or tend to screen out as many handicapped individuals are not shown by the Secretary to be available.

(b) A recipient shall select and administer tests concerning employment so as best to ensure that, when administered to an applicant or employee who has a handicap that impairs sensory, manual, or speaking skills, the test results accurately to reflect the applicant's or employee's job skills aptitude, or whatever factor the test purports to measure, rather than reflecting the applicant's or employee's impaired sensory, manual, or speaking skills (except where those skills are the factors that the test purports to measure).

§8b.14 Preemployment inquiries.

(a) Except as provided in paragraphs (b) and (c) of this section, a recipient may not conduct preemployment inquiry of an applicant for employment as to whether the applicant is a handicapped individual, or as to the nature or severity of a handicap. A recipient may, however, make preemployment inquiry into an applicant's ability to perform job-related functions.

(b) When a recipient is taking remedial action to correct the effects of past discrimination pursuant to §8b.6(a), when a recipient is taking voluntary action to overcome the effects of conditions that resulted in limited participation in this federally assisted program or activity pursuant to §8b.6(b), or when a recipient is taking affirmative action pursuant to section 503 of the Act, the recipient may invite

applicants for employment to indicate whether and to what extent they are handicapped, *Provided*, That:

(1) The recipient states clearly on any written questionnaire used for this purpose or makes clear orally, if no written questionnaire is used, that the information requested is intended for use solely in connection with its remedial action obligations or its voluntary or affirmative action efforts; and

(2) The recipient states clearly that the information is being requested on a voluntary basis, that it will be kept confidential as provided in paragraph (d) of this section, that refusal to provide it will not subject the applicant or employee to any adverse treatment, and that it will be used only in accordance with this part.

(c) Nothing in this section shall prohibit a recipient from conditioning an offer of employment on the results of a medical examination conducted prior to the employee's entrance on duty, *Provided*, That:

(1) All employees are subject to such an examination regardless of handicap, and

(2) The results of such an examination are used only in accordance with the requirements of this part.

(d) Information obtained in accordance with this section as to the medical condition or history of the applicant shall be collected and maintained on separate forms that shall be accorded confidentiality as medical records, except:

(1) Employing officials may obtain the information after making a conditional decision to make a job offer to the applicant or the applicant was placed conditionally in a job pool or placed conditionally on an eligibility list;

(2) Supervisors and managers may be informed regarding restrictions on the work or duties of qualified handicapped individuals and regarding necessary accommodations;

(3) First aid and safety personnel may be informed, where appropriate, if the condition might require emergency treatment; and

(4) Government officials investigating compliance with the Act shall be provided information upon request.

§ 8b.15 Employment on ships.

No qualified handicapped individual possessing an appropriate license or certificate obtained from the United States Coast Guard pursuant to the requirements of 46 CFR 10.01–1 *et seq.* and 12.01–1 *et seq.* shall, on the basis of handicap, be subjected to discrimination in employment on ships under any program or activity to which this part applies.

Subpart C—Program Accessibility

§ 8b.16 Discrimination prohibited.

No qualified handicapped individual shall, because a recipient's facilities are inaccessible to or unusable by handicapped individuals, be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any program or activity to which this part applies.

§ 8b.17 Existing facilities.

(a) *Program accessibility*. A recipient shall operate each program or activity to which this part applies so that the program or activity, when viewed in its entirety, is readily accessible to qualified handicapped individuals. This paragraph does not require a recipient to make each of its existing facilities or every part of a facility accessible to and usable by qualified handicapped individuals. However, if a particular program is available in only one location, that site must be made accessible or the program must be made available at an alternative accessible site or sites. Program accessibility requires nonpersonal aids to make the program accessible to mobility impaired persons.

(b) *Methods*. A recipient may comply with the requirements of paragraph (a) of this section through such means as redesign of equipment, reassignment of classes or other services to accessible buildings, assignment of aides to beneficiaries, home visits, delivery of services at alternate accessible sites, alteration of existing facilities and construction of new facilities in conformance with the requirement of § 8b.19, or any other method that results in making its program or activity accessible to handicapped individuals. A recipient is not required to make structural

changes in existing facilities where other methods are effective in achieving compliance with paragraph (a) of this section. In choosing among available methods for meeting the requirement of paragraph (a) of this section, a recipient shall give priority to those methods that offer programs and activities to handicapped individuals in the most integrated setting appropriate.

(c) If a small recipient finds, after consultation with a qualified handicapped individual seeking its services, that there is no method of complying with paragraph (a) of this section other than making a significant alteration in its existing facilities or facility, the small recipient may, as an alternative, refer the qualified handicapped individual to other providers of those services that are accessible at no additional cost to the handicapped.

(d) *Time period.* A recipient shall comply with the requirement of paragraph (a) of this section within 60 days of the effective date of this part. Where structural changes in facilities are necessary, such changes shall be made within three years of the effective date of this part, but in any event as expeditiously as possible.

(e) *Transition plan.* In the event that structural changes to facilities are necessary to meet the requirement of paragraph (a) of this section, a recipient shall develop, within six months of the effective date of this part, a transition plan setting forth the steps necessary to complete such changes. The plan shall be developed with the assistance of interested persons, including handicapped persons or organizations representing handicapped persons. A copy of the transition plan shall be made available for public inspection. The plan shall, at a minimum:

(1) Identify physical obstacles in the recipient's facilities that limit the accessibility of its program or activity to qualified handicapped individuals;

(2) Describe in detail the methods that will be used to make the facilities accessible;

(3) Specify the schedule for taking the steps necessary to achieve full program accessibility and, if the time period of the transition plan is longer than one year, identify the steps that will be taken during each year of the transition period; and

(4) Indicate the person responsible for implementation of the plan.

(f) *Notice.* The recipient shall adopt and implement procedures to ensure that interested persons, including persons with impaired vision or hearing, can obtain information as to the existence and location of services, activities and facilities that are accessible to and usable by qualified handicapped individuals.

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[47 FR 17746, Apr. 23, 1982, as amended at 47 FR 35472, Aug. 16, 1982]

§8b.18 New construction.

(a) *Design and construction.* Each facility or part of a facility constructed by, on behalf of, or for the use of a recipient shall be designed and constructed in such manner that the facility or part of the facility is readily accessible to and usable by qualified handicapped individuals, if the construction was commenced after the effective date of this part.

(b) *Alteration.* Each facility or part of a facility which is altered by, on behalf of, or for the use of a recipient after the effective date of this part of the facility shall, to the maximum extent feasible, be altered in such manner that the altered portion of the facility is readily accessible to and usable by qualified handicapped individuals.

(c) *Conformance with Uniform Federal Accessibility Standards.* (1) Effective as of August 17, 1990, design, construction, or alteration of buildings in conformance with sections 3–8 of the Uniform Federal Accessibility Standards (UFAS) (Appendix A to 41 CFR subpart 101–19.6) shall be deemed to comply with the requirements of this section with respect to those buildings. Departures from particular technical and scoping requirements of UFAS by the use of other methods are permitted where substantially equivalent or greater access to and usability of the building is provided.

(2) For purposes of this section, section 4.1.6(1)(g) of UFAS shall be interpreted to exempt from the requirements of UFAS only mechanical rooms

and other spaces that, because of their intended use, will not require accessibility to the public or beneficiaries or result in the employment or residence therein of persons with physical handicaps.

(3) This section does not require recipients to make building alterations that have little likelihood of being accomplished without removing or altering a load-bearing structural member.

[47 FR 17746, Apr. 23, 1982, as amended at 55 FR 29320, Jul. 18, 1990]

Subpart D—Post Secondary Education

§ 8b.19 Application of this subpart.

Subpart D applies to post secondary education programs and activities, including post secondary vocational education programs and activities, that receive or benefit from Federal financial assistance for the operation of, such programs or activities.

§ 8b.20 Admission and recruitment.

(a) *General.* Qualified handicapped may not, on the basis of handicap, be denied admission or be subjected to discrimination in admission or recruitment by a recipient to which this subpart applies.

(b) *Admissions.* In administering its admission policies, a recipient to which this subpart applies:

(1) May not apply limitations upon the number or proportion of handicapped individuals who may be admitted; and

(2) May not make use of any test or criterion for admission that has a disproportionate, adverse effect on handicapped individuals or any class of handicapped individuals unless:

(i) The test or criterion, as used by the recipient, has been validated as a predictor of success in the education program or activity in question; and

(ii) Alternate tests or criteria that have a less disproportionate, adverse effect are not shown by the Secretary to be available.

(3) Shall assure itself that (i) admissions tests are selected and administered so as best to ensure that, when a test is administered to an applicant who has a handicap that impairs sensory, manual, or speaking skills, the test results accurately reflect the applicant's aptitude or achievement level of whatever other factor the test purports to measure, rather than reflecting the applicant's impaired sensory, manual, or speaking skills (except where those skills are the factors that the test purports to measure); (ii) admissions tests that are designed for persons with impaired sensory, manual, or speaking skills are offered as often and in as timely a manner as are other admissions tests; and (iii) admissions tests are administered in facilities that, on the whole, are accessible to handicapped individuals; and

(4) Except as provided in paragraph (c) of this section, may not make pre-admission inquiry as to whether an applicant for admission is a handicapped individual but, after admission, may make inquiries on a confidential basis as to handicaps that may require accommodation.

(c) *Pre-admission inquiry exception.* When a recipient is taking remedial action to correct the effects of past discrimination pursuant to § 8b.6(a) or when a recipient is taking voluntary action to overcome the effects of conditions that resulted in limited participation in its federally assisted program or activity pursuant to § 8b.6(b), the recipient may invite applicants for admission to indicate whether and to what extent they are handicapped, *Provided,* That:

(1) The recipient states clearly on any written questionnaire used for this purpose or makes clear orally, if no written questionnaire is used, that the information requested is intended for use solely in connection with its remedial action obligations or its voluntary action efforts; and

(2) The recipient states clearly that the information is being requested on a voluntary basis, that it will be kept confidential, that refusal to provide it will not subject the applicant to any adverse treatment, and that it will be used only in accordance with this part.

(d) *Validity studies.* For the purpose of paragraph (b)(2) of this section, a recipient may base prediction equations on first year grades, but shall conduct periodic validity studies against the

criterion of overall success in the education program or activity in question in order to monitor the general validity of the test scores.

§8b.21 Treatment of students.

(a) *General.* No qualified handicapped student shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any academic research, occupational training, housing, health insurance, counseling, financial aid, physical education, athletics, recreation, transportation, other extracurricular, or other post secondary education program or activity to which this subpart applies.

(b) A recipient to which this subpart applies that considers participation by students in education programs or activities not operated wholly by the recipient as part of, or equivalent to, education programs or activities operated by the recipient shall assure itself that the other education program or activity, as a whole, provides an equal opportunity for the participation of qualified handicapped persons.

(c) A recipient to which this subpart applies may not, on the basis of handicap exclude any qualified handicapped student from any course or study, or other part of its education program or activity.

(d) A recipient to which this subpart applies shall operate its programs and activities in the most integrated setting appropriate.

§8b.22 Academic adjustments.

(a) *Academic requirements.* A recipient to which this subpart applies shall make such modifications to its academic requirements as are necessary to ensure that such requirements do not discriminate or have the effect of discriminating, on the basis of handicap, against a qualified handicapped applicant or student. Academic requirements that the recipient can demonstrate are essential to the program of instruction being pursued by such student or to any directly related licensing requirement will not be regarded as discriminatory within the meaning of this section. Modifications may include changes in the length of time permitted for the completion of degree requirements, substitution of specific courses required for the completion of degree requirements, and adaptation of the manner in which specific courses are conducted.

(b) *Other rules.* A recipient to which this subpart applies may not impose upon handicapped students other rules, such as the prohibition of tape recorders in classrooms or of dog guides in campus buildings, that have the effect of limiting the participation of handicapped students in the recipient's education program or activity.

(c) *Course examinations.* In its course examinations or other procedures for evaluating student's academic achievement in its program, a recipient to which this subpart applies shall provide such methods for evaluating the achievement of students who have a handicap that impairs sensory, manual, or speaking skills as will best ensure that the results of the evaluation represents the student's achievement in the course, rather than reflecting the student's impaired sensory, manual, or speaking skills (except where such skills are the factors that the test purports to measure).

(d) *Auxiliary aids.* (1) A recipient to which this subpart applies shall ensure that no handicapped student is denied the benefits of, excluded from participation in, or otherwise subjected to discrimination under the education program or activity operated by the recipient because of the absence of educational auxiliary aids for students with impaired sensory, manual, or speaking skills. A recipient shall operate each program or activity to which this subpart applies so that, when viewed in its entirety, auxiliary aids are readily available.

(2) Auxiliary aids may include taped text, interpreters or other effective methods of making orally delivered materials available to students with hearing impairments, readers in libraries for students with visual impairments, classroom equipment adapted for use by students with manual impairments, and other similar services and actions. Recipients need not provide attendants, individually prescribed devices, readers for personal use or study, or other devices or services of a personal nature.

§ 8b.23 Housing provided by the recipient.

(a) A recipient that provides housing to its nonhandicapped students shall provide comparable, convenient, and accessible housing to handicapped students at the same cost as to others. At the end of transition period provided for in subpart C, such housing shall be available in sufficient quantity and variety so that the scope of handicapped students choice of living accommodations is, as a whole, comparable to that of nonhandicapped students.

(b) *Other housing.* A recipient that assists any agency, organization, or person in making housing available to any of its students shall take such action as may be necessary to assure itself that such housing is, as a whole, made available in a manner that does not result in discrimination on the basis of handicap.

§ 8b.24 Financial and employment assistance to students.

(a) *Provision of financial assistance.* (1) In providing financial assistance to qualified handicapped individuals, a recipient to which this subpart applies may not (i) on the basis of handicap, provide less assistance than is provided to nonhandicapped persons, limit eligibility for assistance, or otherwise discriminate or (ii) assist any entity or person that provides assistance to any of the recipient's students in a manner that discriminates against qualified handicapped individuals on the basis of handicap.

(2) A recipient may administer or assist in the administration of scholarships, fellowships, or other forms of financial assistance established under wills, trust, bequest, or similar legal instruments that require awards to be made on the basis of factors that discriminate or have the effect of discriminating on the basis of handicap only if the overall effect of the award of scholarships, fellowships, and other forms of financial assistance is not discriminatory on the basis of handicap.

(b) *Assistance in making available outside employment.* A recipient that assists any agency, organization, or person in providing employment opportunities to any of its students shall assure itself that such employment opportunities, as a whole, are made available in a manner that would not violate subpart B if they were provided by the recipient.

(c) *Employment of student by recipients.* A recipient that employs any of its students may not do so in a manner that violates subpart B.

§ 8b.25 Nonacademic services.

(a) *Physical education and athletics.* (1) In providing physical education courses and athletics and similar programs and activities to any of its students, a recipient to which this subpart applies may not discriminate on the basis of handicap. A recipient that offers physical education courses or that operates or sponsors intercollegiate, club, or intramural athletics shall provide to qualified handicapped students an equal opportunity for participation in these activities.

(2) A recipient may offer to handicapped students physical education and athletic activities that are separate or different only if separation of differentiation is consistent with the requirements of § 8b.22(d) and only if no qualified handicapped student is denied the opportunity to compete for teams or to participate in courses that are not separate or different.

(b) *Counseling and placement services.* A recipient to which this subpart applies that provides personal, academic, or vocational counseling guidance, or placement services to its students shall provide these services without discrimination on the basis of handicap. The recipient shall ensure that qualified handicapped students are not counseled toward more restrictive career objectives than are nonhandicapped students with similar interests and abilities. This requirement does not preclude a recipient from providing factual information about licensing and certification requirements that may present obstacles to handicapped persons in their pursuit of particular careers.

(c) *Social organizations.* A recipient that provides significant assistance to fraternities, sororities, or similar organizations shall assure itself that the membership practices of such organizations do not permit discrimination otherwise prohibited by this subpart.

Subpart E—Procedures

§8b.26 Procedures.

The enforcement provisions applicable to Title VI of the Civil Rights Act of 1964 found at §§8.7 through 8.15 of this subtitle shall apply to this part.

PART 8c—ENFORCEMENT OF NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS OR ACTIVITIES CONDUCTED BY THE DEPARTMENT OF COMMERCE

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AUTHORITY: 29 U.S.C 794.

SOURCE: 53 FR 19277, May 27, 1988, unless otherwise noted.

§8c.1 Purpose.

This part effectuates section 119 of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, which amended section 504 of the Rehabilitation Act of 1973 to prohibit discrimination on the basis of handicap in programs or activities conducted by Executive agencies or the United States Postal Service.

§8c.2 Application.

This part applies to all programs or activities conducted by the agency except for programs or activities conducted outside the United States that do not involve individuals with handicaps in the United States.

§8c.3 Definitions.

For purposes of this part, the term—

Agency means the Department of Commerce.

Assistant Attorney General means the Assistant Attorney General, Civil Rights Division, United States Department of Justice.

Auxiliary aids means services or devices that enable persons with impaired sensory, manual, or speaking skills to have an equal opportunity to participate in, and enjoy the benefits of, programs or activities conducted by the agency. For example, auxiliary aids useful for persons with impaired vision include readers, Brailled materials, audio recordings, and other similar services and devices. Auxiliary aids useful for persons with impaired hearing include telephone handset amplifiers, telephones compatible with hearing aids, telecommunication devices for deaf persons (TDD's), interpreters, notetakers, written materials, and other similar services and devices.

Complete complaint means a written statement that contains the complainant's name and address and describes the agency's alleged discriminatory action in sufficient detail to inform the agency of the nature and date of the alleged violation of section 504. It shall be signed by the complainant or by someone authorized to do so on his or her behalf. Complaints filed on behalf of classes or third parties shall describe or identify (by name, if possible) the alleged victims of discrimination.

Facility means all or any portion of buildings, structures, equipment, roads, walks, parking lots, rolling stock or other conveyances, or other real or personal property.

Individual with handicaps means any person who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment. As used in this definition, the phrase:

(1) ''Physical or mental impairment'' includes—

(i) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of

the following body systems: Neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine; or

(ii) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. The term ''physical or mental impairment'' includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, and drug addiction and alcoholism

(2) ''Major life activities'' includes functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(3) ''Has a record of such an impairment'' means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(4) ''Is regarded as having an impairment'' means—

(i) Has a physical or mental impairment that does not substantially limit major life activities but is treated by the agency as constituting such a limitation;

(ii) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others towards such impairment; or

(iii) Has none of the impairments defined in subparagraph (1) of this definition but is treated by the agency as having such an impairment.

Qualified individual with handicaps means—

(1) With respect to any agency program or activity under which a person is required to perform services or to achieve a level of accomplishment, an individual with handicaps who meets the essential eligibility requirements and who can achieve the purpose of the program or activity without modifications in the program or activity that the agency can demonstrate would result in a fundamental alteration in its nature;

(2) With respect to any other program or activity, an individual with handicaps who meets the essential eligibility requirements for participation in, or receipt of benefits from, that program or activity; and

(3) ''Qualified handicapped person'' as that term is defined for purposes of employment in 29 CFR 1613.702(f), which is made applicable to this part by § 8c.40.

Section 504 means section 504 of the Rehabilitation Act of 1973 (Pub. L. 93–112, 87 Stat. 394 (29 U.S.C. 794)), as amended by the Rehabilitation Act Amendments of 1974 (Pub. L. 93–516, 88 Stat. 1617); the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978) Pub. L. 95–602, 92 Stat. 2955); and the Rehabilitation Act Amendments of 1986 (Pub. L. 99–506, 100 Stat. 1810). As used in this part, section 504 applies only to programs or activities conducted by Executive agencies and not to federally assisted programs.

[53 FR 19277, May 27, 1988; 53 FR 25722, July 8, 1988]

§§ 8c.4—8c.9 [Reserved]

§ 8c.10 Self-evaluation.

(a) The agency shall, by July 26, 1989, evaluate its current policies and practices, and the effects thereof, that do not or may not meet the requirements of this part, and, to the extent modification of any such policies and practices is required, the agency shall proceed to make the necessary modifications.

(b) The agency shall provide an opportunity to interested persons, including individuals with handicaps or organizations representing individuals with handicaps, to participate in the self-evaluation process by submitting comments (both oral and written).

(c) The agency shall, until three years following the completion of the self-evaluation, maintain on file and make available for public inspection:

(1) A description of areas examined and any problems identified, and

(2) A description of any modifications made.

§8c.11 Notice.

The agency shall make available to employees, applicants, participants, beneficiaries, and other interested persons such information regarding the provisions of this part and its applicability to the programs or activities conducted by the agency, and make such information available to them in such manner as the Secretary of Commerce or the Secretary's designee finds necessary to apprise such persons of the protections against discrimination assured them by section 504 and this regulation.

§§8c.12—8c.29 [Reserved]

§8c.30 General prohibitions against discrimination.

(a) No qualified individual with handicaps shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity conducted by the agency.

(b)(1) The agency, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of handicap—

(i) Deny a qualified individual with handicaps the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified individual with handicaps an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

(iii) Provide a qualified individual with handicaps with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;

(iv) Provide different or separate aid, benefits, or services to individuals with handicaps or to any class of individuals with handicaps than is provided to others unless such action is necessary to provide qualified individuals with handicaps with aid, benefits, or services that are as effective as those provided to others;

(v) Deny a qualified individual with handicaps the opportunity to participate as a member of a planning or advisory board; or

(vi) Otherwise limit a qualified individual with handicaps in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service.

(2) The agency may not deny a qualified individual with handicaps the opportunity to participate in programs or activities that are not separate or different, despite the existence of permissibly separate or different programs or activities.

(3) The agency may not, directly or through contractual or other arrangements, utilize criteria or methods of administration the purpose or effect of which would—

(i) Subject qualified individuals with handicaps to discrimination on the basis of handicaps; or

(ii) Defeat or substantially impair accomplishment of the objectives of a program or activity with respect to individuals with handicaps.

(4) The agency may not, in determining the site or location of a facility, make selections the purpose or effect of which would—

(i) Exclude individuals with handicaps from, deny them the benefits of, or otherwise subject them to discrimination under any program or activity conducted by the agency; or

(ii) Defeat or substantially impair the accomplishment of the objectives of a program with respect to individuals with handicaps.

(5) The agency, in the selection of procurement contractors, may not use criteria that subject qualified individuals with handicaps to discrimination on the basis of handicap.

(6) The agency may not administer a licensing or certification program in a manner that subjects qualified individuals with handicaps to discrimination on the basis of handicap, nor may the agency establish requirements for the programs or activities of licensees or certified entities that subject qualified individuals with handicaps to discrimination on the basis of handicap. However, the programs or activities of entities that are licensed or certified by the agency are not, themselves, covered by this part.

(c) The exclusion of nonhandicapped persons from the benefits of a program limited by Federal statute or Executive order to individuals with handicaps or the exclusion of a specific class of individuals with handicaps from a program limited by Federal statute or Executive order to a different class of individuals with handicaps is not prohibited by this part.

(d) The agency shall administer programs and activities in the most integrated setting appropriate to the needs of qualified individuals with handicaps.

§§ 8c.31—8c.39 [Reserved]

§ 8c.40 Employment.

No qualified individual with handicaps shall, on the basis of handicap, be subjected to discrimination in employment under any program or activity conducted by the agency. The definitions, requirements, and procedures of section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791), as established by the Equal Employment Opportunity Commission in 29 CFR Part 1613, shall apply to employment in federally conducted programs or activities.

§§ 8c.41—8c.48 [Reserved]

§ 8c.49 Program accessibility: Discrimination prohibited.

Except as otherwise provided in § 8c.50, no qualified individual with handicaps shall, because the agency's facilities are inaccessible to or unusable by individuals with handicaps, be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any program or activity conducted by the agency.

§ 8c.50 Program accessibility: Existing facilities.

(a) *General.* The agency shall operate each program or activity so that the program or activity, when viewed in its entirety, is readily accessible to and usable by individuals with handicaps. This paragraph does not—

(1) Necessarily require the agency to make each of its existing facilities accessible to and usable by individuals with handicaps; or

(2) Require the agency to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. In those circumstances where agency personnel believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the agency has the burden of proving that compliance with section § 8c.50(a) would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the Secretary of Commerce or the Secretary's designee after considering all agency resources available for use in the funding and operation of the conducted program or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action would result in such an alteration or such burdens, the agency shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that individuals with handicaps receive the benefits and services of the program or activity.

(b) *Methods.* The agency may comply with the requirements of this section through such means as redesign of equipment, reassignment of services to accessible buildings, assignment of aides to beneficiaries, home visits, delivery of services at alternate accessible sites, alteration of existing facilities and construction of new facilities, use of accessible rolling stock, or any other methods that result in making its programs or activities readily accessible to and usable by individuals with handicaps. The agency is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with this section. The agency, in making alterations to existing buildings, shall meet accessibility requirements to the extent compelled by the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151–4157), and any regulations implementing it. In choosing among available methods for meeting the requirements of this section, the agency shall give priority to those methods that offer programs and activities to qualified individuals with

handicaps in the most integrated setting appropriate.

(c) *Time period for compliance.* The agency shall comply with the obligations established under this section by September 26, 1988, except that where structural changes in facilities are undertaken, such changes shall be made by July 26, 1991, but in any event as expeditiously as possible.

(d) *Transition plan.* In the event that structural changes to facilities will be undertaken to achieve program accessibility, the agency shall develop, by January 26, 1989, a transition plan setting forth the steps necessary to complete such changes. The agency shall provide an opportunity to interested persons, including individuals with handicaps or organizations representing individuals with handicaps, to participate in the development of the transition plan by submitting comments (both oral and written). A copy of the transition plan shall be made available for public inspection. The plan shall, at a minimum—

(1) Identify physical obstacles in the agency's facilities that limit the accessibility of its program or activities to individuals with handicaps;

(2) Describe in detail the methods that will be used to make the facilities accessible;

(3) Specify the schedule for taking the steps necessary to achieve compliance with this section and, if the time period of the transition plan is longer than one year, identify steps that will be taken during each year of the transition period; and

(4) Indicate the official responsible for implementation of the plan.

§8c.51 Program accessibility: New construction and alterations.

Each building or part of a building that is constructed or altered by, on behalf of, or for the use of the agency shall be designed, constructed, or altered so as to be readily accessible to and usable by individuals with handicaps. The definitions, requirements, and standards of the Architectural Barriers Act (42 U.S.C. 4151–4157), as established in 41 CFR 101–19.600 to 101–19.607, apply to buildings covered by this section.

§§8c.52—8c.59 [Reserved]

§8c.60 Communications.

(a) The agency shall take appropriate steps to ensure effective communication with applicants, participants, personnel of other Federal entities, and members of the public.

(1) The agency shall furnish appropriate auxiliary aids where necessary to afford an individual with handicaps an equal opportunity to participate in, and enjoy the benefits of, a program or activity conducted by the agency.

(i) In determining what type of auxiliary aid is necessary, the agency shall give primary consideration to the requests of the individual with handicaps.

(ii) The agency need not provide individually prescribed devices, readers for personal use or study, or other devices of a personal nature.

(2) Where the agency communicates with applications and beneficiaries by telephone, telecommunication devices for deaf persons (TDD's) or equally effective telecommunication systems shall be used.

(b) The agency shall ensure that interested persons, including persons with impaired vision or hearing, can obtain information as to the existence and location of accessible services, activities, and facilities.

(c) The agency shall provide signs at a primary entrance to each of its inaccessible facilities, directing users to a location at which they can obtain information about accessible facilities. The international symbol for accessibility shall be used at each primary entrance of an accessible facility.

(d) This section does not require the agency to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. In those circumstances where agency personnel believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the agency has the burden of proving that compliance with §8c.60 would result in such alteration or burdens. The decision that compliance would result in such alteration of burdens must be

made by the Secretary of Commerce or the Secretary's designee after considering all agency resources available for use in the funding and operation of the conducted program or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action required to comply with this section would result in such an alteration or such burdens, the agency shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that, to the maximum extent possible, individuals with handicaps receive the benefits and services of the program or activity.

§§ 8c.61—8.69 [Reserved]

§ 8c.70 Compliance procedures

(a) Except as provided in paragraph (b) of this section, this section applies to all allegations of discrimination on the basis of handicap in programs or activities conducted by the agency.

(b) The agency shall process complaints alleging violations of section 504 with respect to employment according to the procedures established by the Equal Employment Opportunity Commission in 29 CFR Part 1613 pursuant to section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791).

(c) The Chief of the Compliance Divison shall be responsible for coordinating implemention of this section. Complaints may be sent to Chief, Compliance Division, Office of Civil Rights, Room 6012, Herbert C. Hoover Building, 14th and Constitution Avenue, Washington, DC, 20230.

(d) The agency shall accept and investigate all complete complaints for which it has jurisdiction. All complete complaints must be filed within 180 days of the alleged act of discrimination. The agency may extend this time period for good cause.

(e) If the agency receives a complaint over which it does not have jurisdiction, it shall promptly notify the complainant and shall make reasonable efforts to refer the complaint to the appropriate government entity.

(f) The agency shall notify the Architectural and Transportation Barriers Compliance Board upon receipt of any complaint alleging that a building or facility that is subject to the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151–4157), is not readily accessible to and usable by individuals with handicaps.

(g) Within 180 days of the receipt of a complete complaint for which it has jurisdiction, the agency shall notify the complainant of the results of the investigation in a letter containing—

(1) Findings of fact and conclusions of law;

(2) A description of a remedy for each violation found; and

(3) A notice of the right to appeal.

(h) Appeals of the findings of fact and conclusions of law or remedies must be filed by the complainant within 90 days of receipt from the agency of the letter required by §8c.70(g). The agency may extend this time for good cause.

(i) Timely appeals shall be accepted and processed by the Assistant Secretary for Administration.

(j) The Assistant Secretary for Administration shall notify the complainant of the results of the appeal within 60 days of the receipt of the request. If the Assistant Secretary for Administration determines that additional information is needed from the complainant, he or she shall have 60 days from the date of receipt of the additonal information to make his or her determination on the appeal.

(k) The time limits cited in paragraphs (g) and (j) of the section may be extended with the permission of the Assistant Attorney General.

(l) The agency may delegate its authority for conducting complaint investigations to other Federal agencies, except that the authority for making the final determination may not be delegated to another agency.

[53 FR 19277, May 27, 1988; 53 FR 25722, July 8, 1988]

PART 9—PROCEDURES FOR A VOLUNTARY LABELING PROGRAM FOR HOUSEHOLD APPLIANCES AND EQUIPMENT TO EFFECT ENERGY CONSERVATION

Sec.
9.0 Purpose.
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program.
9.4 Development of voluntary energy conservation specifications.
9.5 Participation of manufacturers.
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9.10 Coordination with State and local programs.
9.11 Annual report.

AUTHORITY: Sec. 2, 31 Stat. 1449, as amended, sec. 1, 64 Stat. 371; 15 U.S.C. 272, Reorganization Plan No. 3 of 1946, Part VI; Message from the President of the United States Concerning Energy Resources, April 18, 1973 (119 Cong. Rec. H2886).

SOURCE: 38 FR 29574, Oct. 26, 1973, unless otherwise noted.

§9.0 Purpose.

The purpose of this part is to establish procedures relating to the Department's voluntary labeling program for household appliances and equipment to promote and effect energy conservation.

§9.1 Goal of program.

(a) This program was initiated in response to the direction of President Nixon in his 1973 Energy Message that the Department of Commerce in cooperation with the Council on Environmental Quality and the Environmental Protection Agency develop a voluntary labeling program which would apply to energy-consuming home appliances.

(b) The goal of this program is to encourage manufacturers to provide consumers, at the point of sale, with information on the energy consumption and energy efficiency of household appliances and equipment. Such information, presented in a uniform manner readily understandable to consumers, would be displayed on labels attached to or otherwise provided with the appliances or equipment. The labels will include a system intended to make it possible for consumers to compare by cost or otherwise the energy consumption and energy efficiency characteristics when purchasing household appliances and equipment and to select those that can effect savings in energy consumption.

§9.2 Definitions.

(a) The term *Secretary* means the Secretary of Commerce.

(b) The term *manufacturer* means any person engaged in the manufacturing or assembling of new appliances or equipment in the United States, or in the importing of such products for sale or resale, or any person whose brand or trademark appears on such products who owns such brand or trademark and has authorized its use on such products, if the brand or trademark of the person actually manufacturing or assembling the products does not appear on the products.

(c) The term *energy consumption* means the energy resources used by appliances or equipment under conditions of use approximating actual operating conditions insofar as practical as determined through test procedures contained or identified in a final Voluntary Energy Conservation Specification published under §9.4(e).

(d) The term *energy efficiency* means the energy use of appliances or equipment relative to their output of services, as determined through test procedures contained or identified in a final Voluntary Energy Conservation Specification published under §9.4(e).

(e) The term *consumer* means the first person who purchases a new appliance or item of equipment for purposes other than resale.

(f) The term *class of appliance or equipment* means a group of appliances or equipment whose functions or features are similar, and whose functional output covers a range that may be of interest to consumers.

(g) The term *Specification* means a Voluntary Energy Conservation Specification developed under §9.4.

(h) The term *Label* means printed matter affixed to or otherwise provided with appliances or equipment and meeting all the requirements called for in a Voluntary Energy Conservation Specification published under §9.4(e).

[38 FR 29574, Oct. 26, 1973, as amended at 40 FR 33966, Aug. 13, 1975]

§9.3 Appliances and equipment included in program.

The appliances and equipment included in this program are room and

central air conditioners, household refrigerators, home freezers, clothes washers, dishwashers, clothes dryers, kitchen ranges and ovens, water heaters, comfort heating equipment, and television receivers. Additional appliances and equipment may be included in the program by the Secretary pursuant to rule making procedures as set out in 5 U.S.C. 553. Individual units of appliances and equipment manufactured for export are not included in this program.

[38 FR 29574, Oct. 26, 1973, as amended at 40 FR 33966, Aug. 13, 1975]

§ 9.4 Development of voluntary energy conservation specifications.

(a) The Secretary in cooperation with appropriate Federal agencies and in cooperation with affected manufacturers, distributors, retailers, consumers, environmentalists, and other interested parties shall develop proposed Specifications for the specific classes of appliances and equipment covered under § 9.3.

(b) Each Specification shall as a minimum include:

(1) A description of the class of appliance or equipment covered by the Specification, listing the distribution of energy efficiencies for that class of appliance or equipment.

(2) Listings or descriptions of test methods to be used in measuring the energy consumption and/or energy efficiency characteristics of the class of appliance or equipment.

(3) A prototype Label and directions for displaying the Label on or with appliances or equipment of that class. The Label shall be prominent, readable, and visible and shall include information that will assist the consumer in comparing by cost or otherwise the energy consumption and/or energy efficiency characteristics of a particular appliance or item of equipment with all others in its class. The Label shall also include the Department of Commerce Energy Conservation Mark specified in § 9.7.

(4) Conditions for the participation of manufacturers in the program.

(c) The test methods listed or described in the Specification pursuant to § 9.4(b)(2) shall be those described in existing nationally-recognized voluntary standards where such methods are appropriate. Where appropriate test methods do not so exist, they will be developed by the Department of Commerce in cooperation with interested parties.

(d) The Secretary upon development of a proposed Specification shall publish in the FEDERAL REGISTER a notice giving the complete text of the proposed Specification, and any other pertinent information, and inviting any interested person to submit written comments on the proposed Specification within 30 days after its publication in the FEDERAL REGISTER, unless another time limit is provided by the Secretary. Interested persons wanting to express their views in an informal hearing may do so if, within 15 days after the proposed Specification is published in the FEDERAL REGISTER, they request the Secretary to hold a hearing. Such informal hearings shall be held so as to give all interested persons opportunity for the oral presentation of data, views, or arguments in addition to the opportunity to make written submissions. Notice of such hearings shall be published in the FEDERAL REGISTER. A transcript shall be kept of any oral presentations.

(e) The Secretary, after consideration of all written and oral comments and other materials received in accordance with paragraph (d) of this section, shall publish in the FEDERAL REGISTER within 30 days after the final date for receipt of comments, or as soon as practicable thereafter, a notice either:

(1) Giving the complete text of a final Specification, including conditions of use, and stating that any manufacturer of appliances or equipment in the class concerned desiring voluntarily to use the Label and Energy Conservation Mark with such appliances or equipment must advise the Department of Commerce; or

(2) Stating that the proposed Specification will be further developed before final publication; or

(3) Withdrawing the proposed Specification from further consideration.

§ 9.5 Participation of manufacturers.

(a) Manufacturers desiring to participate in this program will so notify the

Department of Commerce. The notification will identify the particular Specification to be used and the manufacturer's model numbers for the products to be labeled. The notification will also state that the manufacturer will abide by all conditions contained in the Specification and will desist from using the Label and Energy Conservation Mark if requested by the Department of Commerce under the provisions of §9.6.

(b) The conditions for participation will be set out in the Specification and will include, but not be limited to, the following:

(1) Prior to the use of a Label the manufacturer will make or have made the measurements to obtain the information required for inclusion on the Label and, if requested, will forward within 30 days such measurement data to the Department of Commerce. Such measurement data will be kept on file by the manufacturer or his agent for two years after that model of appliance or equipment is no longer manufactured unless otherwise provided in the Specification. The use of independent test laboratories or national certification programs available to any manufacturer is acceptable for the purposes of this program.

(2) The manufacturer will describe the test results on the Label as prescribed in the Specification.

(3) The manufacturer will display or arrange to display, in accordance with the appropriate Specification, the Label on or with each individual unit of appliance or equipment within the subject class and with the same brand name manufactured by him except for units exported from the United States. All models with the same brand name that fall within the class must be included in the program unless they are for export only.

(4) The manufacturer agrees at his expense to comply with any reasonable request of the Department of Commerce to have appliances or equipment manufactured by him tested to determine that testing has been done according to the relevant Specification.

(5) Manufacturers may reproduce the Department of Commerce Labels and Energy Conservation Mark in advertising provided that the entire Label, complete with all information required to be displayed at the point of retail sale, is shown legibly.

§9.6 Termination of participation.

(a) The Department of Commerce upon finding that a manufacturer is not complying with the conditions of participation set out in these procedures or in a Specification may terminate upon 30 days notice the manufacturer's participation in the program: *Provided,* That the manufacturer shall first be given an opportunity to show cause why the participation should not be terminated. Upon receipt of a notice of termination, a manufacturer may request within 30 days a hearing under the provisions of 5 U.S.C. 558.

(b) A manufacturer may at any time terminate his participation and responsibilities under this program with regard to a specific class of products by giving written notice to the Secretary that he has discontinued use of the Label and Energy Conservation Mark for all appliances or equipment within that class.

§9.7 Department of Commerce energy conservation mark.

The Department of Commerce shall develop an Energy Conservation Mark which shall be registered in the U.S. Patent Office under 15 U.S.C. 1054 for use on each Label described in a Specification.

§9.8 Amendment or revision of voluntary energy conservation specifications.

The Secretary may by order amend or revise any Specification published under §9.4. The procedure applicable to the establishment of a Specification under §9.4 shall be followed in amending or revising such Specification. Such amendment or revision shall not apply to appliances or equipment manufactured prior to the effective date of the amendment or revision.

§9.9 Consumer education.

The Department of Commerce, in close cooperation and coordination with interested Government agencies, appropriate industry trade associations and industry members, and interested consumers and environmentalists shall

carry out a program to educate consumers relative to the significance of the labeling program. Some elements of this program shall also be directed toward informing retailers and other interested groups about the program.

§ 9.10 Coordination with State and local programs.

The Department of Commerce will establish and maintain an active program of communication with appropriate state and local government offices and agencies and will furnish and make available information and assistance that will promote to the greatest practicable extent uniformity in State, local, and Federal programs for the labeling of household appliances and equipment to effect energy conservation.

§ 9.11 Annual report.

The Secretary will prepare an annual report of activities under the program, including an evaluation of the program and a list of participating manufacturers and classes of appliances and equipment.

PART 10—PROCEDURES FOR THE DEVELOPMENT OF VOLUNTARY PRODUCT STANDARDS

Sec.

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AUTHORITY: Sec. 2.31 Stat. 1449, as amended, sec. 1, .64 Stat 371; 15 U.S.C. 272, Reorganization Plan No. 3 of 1946, Part VI (3 CFR 1943–1948 Comp., p. 1065).

SOURCE: 51 FR 22497, June 20, 1986, unless otherwise noted.

§ 10.0 General.

(a) *Introduction.* The Department of Commerce (hereinafter referred to as the ''Department'') recognizes the importance, the advantages, and the benefits of voluntary standards and standardization activities. Such standards may cover, but are not limited to, terms, classes, sizes (including quantities of packaged consumer commodities), dimensions, capacities, quality levels, performance criteria, inspection requirements, marking requirements, testing equipment, test procedures and installation procedures. Economic growth is promoted through:

(1) Reduction of manufacturing costs, inventory costs, and distribution costs;

(2) Better understanding among manufacturers, producers, or packagers (hereinafter referred to as producers), distributors, users, and consumers; and

(3) Simplification of the purchase, installation, and use of the product being standardized.

(b) *Requirements for Department of Commerce sponsorship.* The Department may sponsor the development of a voluntary Product Standard if, upon receipt of a request, the Department determines that:

(1) The proposed standard is likely to have substantial public impact;

(2) The proposed standard reflects the broad interest of an industry group or an organization concerned with the manufacture, production, packaging, distribution, testing, consumption, or use of the product, or the interest of a Federal or State agency;

(3) The proposed standard would not duplicate a standard published by, or actively being developed or revised by, a private standards-writing organization to such an extent that it would contain similar requirements and test methods for identical types of products, unless such duplication was deemed by the Department to be in the public interest;

(4) Lack of government sponsorship would result in significant public disadvantage for legal reasons or reasons of domestic and international trade;

(5) The proposed standard is not appropriate for development and maintenance by a private standards-writing organization; and

(6) The proposed standard will be funded by a proponent organization or government agency to cover costs for administrative and technical support services provided by the Department.

(c) *Role of the Department.* The Department assists in the establishment of a Voluntary Product Standard as follows:

(1) Acts as an unbiased coordinator in the development of the standard;

(2) Provides editorial assistance in the preparation of the standard;

(3) Supplies such assistance and review as is required to assure the technical soundness of the standard;

(4) Seeks satisfactory adjustment of valid points of disagreement;

(5) Determines the compliance with the criteria established in these procedures for such voluntary standards;

(6) Provides secretarial functions for each committee appointed by the Department under these procedures;

(7) Publishes the standard as a public document;

(8) Administers the funds for administrative and technical support services; and

(9) Seeks listing for standards developed under these procedures as American National Standards through the American National Standards Institute, when deemed appropriate by the Department.

(d) *Role of producers, distributors, users, and consumers.* Producers, distributors, users, consumers, and other interested groups may contribute to the development of a Voluntary Product Standard as follows:

(1) Initiate and participate in the development of the standard;

(2) Provide technical or other relevant counsel, as appropriate, relating to the standard;

(3) Promote the use of, and support for, the standard; and

(4) Assist in keeping the standard current with respect to advancing technology and marketing practices.

(e) *Role of the National Institute of Standards & Technology.* The National Institute of Standards & Technology (NIST) administers these procedures for the Department. Any communications concerning these procedures (e.g., questions, clarifications, appeals) should be addressed to the Office of Product Standards Policy, National Institute of Standards & Technology, Gaithersburg, Maryland 20899.

[51 FR 22497, June 20, 1986, as amended at 55 FR 38315, Sept. 18, 1990]

§10.1 Initiating development of a new standard.

(a) Any group or association of producers, distributors, users, or consumers, or a testing laboratory, or a State or Federal agency, may request the Department to initiate the development and publication of a Voluntary Product Standard under these procedures. Requests shall be in writing, signed by a representative of the group or agency, and forwarded to the Department. The initial request may be accompanied by a copy of a draft of the suggested standard.

(b) The request shall include a commitment to provide sufficient funding to cover all costs associated with the development and maintenance of the proposed Voluntary Product Standard.

(c) The Department may require additional information such as technical, marketing, or other appropriate data essential to discussion and development of the proposed standard, including, but not limited to, physical, mechanical, chemical, or performance characteristics, and production figures.

(d) Upon receipt of an appropriate request and after a determination by the Department that the development of a Voluntary Product Standard is justified, the Department may initiate the development by requesting that a draft of the suggested standard be prepared by an appropriate committee, provided such a draft has not previously been submitted under paragraph (a) of this section.

(e) The Department may initiate the development of a Voluntary Product Standard, if such action is deemed by the Department to be in the public interest, notwithstanding the absence of a request from an outside source. A voluntary standard initiated by the Department shall be processed in accordance with all requirements of these procedures and shall be developed in

the same manner as a voluntary standard initiated by any group referred to in paragraph (a) of this section.

(f) An agreement regarding funding procedures and receipt of a deposit estimated by the Department to be sufficient to cover the first year's costs shall occur prior to the initiation of any project.

§ 10.2 Funding.

Groups who represent producers, distributors, consumers or users, or others that wish to act or continue to act as proponent organizations for the development or maintenance of a Voluntary Product Standard will be required to pay for administrative and technical support services provided by the National Institute of Standards & Technology and such other direct or indirect costs associated with the development or maintenance of that standard as may be deemed appropriate by the Department, including costs to the Department in connection with the operation of the Standard Review Committee and the Standing Committee. Funds may also be provided by a government agency at the request of a proponent organization or when acting on its own behalf for the development or maintenance of a Voluntary Product Standard. Proponents of standards that meet sponsorship criteria established in these procedures shall furnish an initial deposit of funds sufficient to cover the first year's services and other costs. Estimated annual costs will be based on an hourly rate for salary and overhead established by the Department for the National Institute of Standards & Technology's administrative and technical support services plus estimates of direct costs to provide funds for such items as the travel of consumer representatives unable to otherwise attend committee meetings, travel for Department staff, and printing costs. Project funds will be reviewed annually. Excess funds may be refunded or applied to the next accounting period. Should funds from deposits be inadequate during an accounting period, work on the project will continue only if funds are restored to a level estimated adequate to complete the 12-month period.

[51 FR 22497, June 20, 1986, as amended at 55 FR 38315, Sept. 18, 1990]

§ 10.3 Development of a proposed standard.

(a) A proposed standard as submitted to the Department:

(1) Shall be based on adequate technical information, or, in the case of size standards (including standards covering the quantities for packaged consumer commodities), on adequate marketing information, or both, as determined to be appropriate by the Department;

(2) Shall not be contrary to the public interest;

(3) Shall be technically appropriate and such that conformance or nonconformance with the standard can be determined either during or after the manufacturing process by inspection or other procedures which may be utilized by either an individual or a testing facility competent in the particular field;

(4) Shall follow the format prescribed by the National Institute of Standards & Technology. (Copies of the recommended format may be obtained from the Office of Product Standards Policy, National Institute of Standards & Technology, Gaithersburg, Maryland 20899.);

(5) Shall include performance requirements if such are deemed by the Department to be technically sound, feasible, and practical, and the inclusion of such is deemed to be appropriate;

(6) May include dimensions, sizes, material specifications, product requirements, design stipulations, component requirements, test methods, testing equipment descriptions, and installation procedures. The appropriateness of the inclusion in a standard of any particular item listed in this subparagraph shall be determined by the Department; and

(7) Shall be accompanied by rational statements pertaining to the requirements and test methods contained in the standard, if deemed necessary by the Department.

(b) A proposed standard that is determined by the Department to meet the

criteria set forth in paragraph (a) of this section may be subjected to further review by an appropriate individual, committee, organization, or agency (either government or nongovernment, but not associated with the proponent group).

(c) A proposed standard may be circulated by the Department to appropriate producers, distributors, users, consumers, and other interested groups for consideration and comment as well as to others requesting the opportunity to comment.

(d) The proponent group or appropriate committee which drafted the initial proposal under §10.1(d) shall consider all comments and suggestions submitted by the reviewer designated under paragraph (b) of this section, and those received by the Department as a result of any circulation under paragraph (c) of this section, and may make such adjustments in the proposal as are technically sound and as are believed to cause the standard to be generally acceptable to producers, distributors, users, consumers, and other interested parties. The proposal will then be submitted to the Department for further processing.

[51 FR 22497, June 20, 1986, as amended at 55 FR 38315, Sept. 18, 1990]

§10.4 Establishment of the Standard Review Committee.

(a) The Department shall establish and appoint the members of a Standard Review Committee within a reasonable time after receiving a proposed standard. The committee shall consist of qualified representatives of producers, distributors, and users or consumers of product for which a standard is sought or any other appropriate general interest groups such as State and Federal agencies. When requested by the Standard Review Committee, the Department shall appoint one voting member from among the representatives of the Federal agencies, other than the Department of Commerce. All other representatives of Federal agencies on the Standard Review Committees shall be advisory nonvoting members. (Alternates to committee members may be designated by the Department.) When deemed appropriate by the Department, project funds under §10.2 may be made available to assure participation by consumer interests on the committee at required meetings.

(b) A Standard Review Committee may remain in existence for a period necessary for the final development of the standard, or for 2 years, whichever is less.

(c) The Department shall be responsible for the organization of the committee. Any formal operating procedures developed by the committee shall be subject to approval by the Department. The committee may conduct business either in a meeting or through correspondence, but only if a quorum participates. A quorum shall consist of two-thirds of all voting members of the committee. A majority of the voting members of the committee participating shall be required to approve any actions taken by the committee except for the action of recommending a standard to the Department, the requirements for which are contained in §10.5(b).

§10.5 Development of a recommended standard.

(a) The Standard Review Committee, with the guidance and assistance of the Department and, if appropriate, the reviewer designated under §10.3(b), shall review a proposed standard promptly. If the committee finds that the proposal meets the requirements set forth in §10.3(a), it may recommend to the Department that the proposal be circulated for acceptance under §10.6. If, however, the committee finds that the proposal being reviewed does not meet the requirements set forth in §10.3(a), the committee shall change the proposal, after consulting with the proponent group, so that these requirements are met, before recommending such proposal to the Department.

(b) The recommendation of a standard by the Standard Review Committee shall be approved by at least three-quarters, or rejected by more than one-quarter, of all of the members of the committee eligible to vote. The voting on the recommendation of a standard shall be conducted by the Department if conducted by letter ballot. If such voting is accomplished at a meeting of the committee, the balloting shall be either by roll call or by signed written

ballot conducted by the Department or the chairman of this committee. If conducted by the chairman, a report of the vote shall be made to the Department within 15 days. If the balloting at the meeting does not result in either approval by at least three-quarters of all members (or alternates) eligible to vote (whether present or not), or rejection by more than one-quarter of the members (or alternates) or the committee eligible to vote, the balloting shall be disregarded and the Department shall subsequently conduct a letter ballot of all members of the committee.

(c) Any member of the committee casting a negative ballot shall have the right to support an objection by furnishing the chairman of the committee and the Department with a written statement setting forth the basis for the objection. The written statement of objection shall be filed within 15 days after the date of the meeting during which the voting on the standard was accomplished, or, in the case of a letter ballot, within the time limit established for the return of the ballot.

(d) At the time a recommended standard is submitted to the Department, the Chairman of the Standard Review Committee shall furnish a written report in support of the committee's recommendation. Such report shall include a statement with respect to compliance with the requirements as established by these procedures, a discussion of the manner in which any objections were resolved, and a discussion of any unresolved objections together with the committee's reasons for rejecting such unresolved objections.

§ 10.6 Procedures for acceptance of a recommended standard.

(a) Upon receipt from the Standard Review Committee of a recommended standard and report, the Department shall give appropriate public notice and distribute the recommended standard for acceptance unless:

(1) Upon a showing by any member of the committee who has voted to oppose the recommended standard on the basis of an unresolved objection, the Department determines that if such objection were not resolved, the recommended standard:

(i) Would be contrary to the public interest, if published;

(ii) Would be technically inadequate; or

(iii) Would be inconsistent with law or established public policy; or

(2) The Department determines that all criteria and procedures set forth herein have not been met satisfactorily or that there is a legal impediment to the recommended standard.

(b) Distribution for acceptance or rejection for the purpose of determining general concurrence will be made to a list compiled by the Department, which, in the judgment of the Department, shall be representative of producers, distributors, and users and consumers.

(c) Distribution for comment will be made to any party filing a written request with the Department, and to such other parties as the Department may deem appropriate, including testing laboratories and interested State and Federal agencies.

(d) The Department shall analyze the recommended standard and the responses received under paragraphs (b) and (c) of this section. If such analysis indicates that the recommended standard is supported by a consensus, it shall be published as a Voluntary Product Standard by the Department: Provided, That all other requirements listed in these procedures have been satisfied.

(e) The following definitions shall apply to the term used in this section:

(1) ''Consensus'' means general concurrence and, in addition, no substantive objection deemed valid by the Department.

(2) ''General concurrence'' means acceptance among those responding to the distribution made under paragraph (b) of this section in accordance with the conditions set forth in paragraph (f) of this section.

(3) ''Substantive objection'' means a documented objection based on grounds that one or more of the criteria set forth in these procedures has not been satisfied.

(4) ''Average industry acceptance'' means a percentage equal to the sum of the percentages of acceptance obtained

from responses to distribution of the recommended standard in the producer segment, the distributor segment, and the user and consumer segment, divided by three. No consideration will be given to volume of production or volume of distribution in determining average industry acceptance.

(5) ''Producer segment'' means those persons who manufacture or produce the product covered by the standard.

(6) ''Distributor segment'' means those persons who distribute at wholesale or retail the product covered by the standard.

(7) ''User and consumer segment'' means those persons who use or consume the product covered by the standard.

(8) ''Acceptance by volume of production'' means the weighted percentage of acceptance of those responding to the distribution in the producer segment. The weighting of each response will be made in accordance with the volume of production represented by each respondent.

(9) ''Acceptance by volume of distribution'' means the weighted percentage of acceptance of those responding to the distribution in the distributor segment. The weighting of each response will be made in accordance with the volume of distribution represented by each respondent.

(f) A recommended standard shall be deemed to be supported by general concurrence whenever:

(1) An analysis of the responses to the distribution under paragraph (b) of this section indicates:

(i) An average industry acceptance of not less than 75 percent;

(ii) Acceptance of not less than 70 percent by the producer segment, the distributor segment, and the user and consumer segment, each segment being considered separately; and

(iii) Acceptance by volume of production and acceptance by volume of distribution of not less than 70 percent in each case: *Provided,* That the Department shall disregard acceptance by volume of production or acceptance by volume of distribution or both unless, in the judgment of the Department, accurate figures for the volume of production or distribution are reasonably available and an evaluation of either or both of such acceptances is deemed necessary by the Department; or

(2) The Department determines that publication of the standard is appropriate under the procedures set forth in paragraph (g) of this section and, in addition, an analysis of the responses to the distribution under paragraph (b) of this section indicates:

(i) An average industry acceptance of not less than 66⅔ percent;

(ii) Acceptance of not less than 60 percent by the producer segment, the distributor segment, and the user and consumer segment, each segment being considered separately; and

(iii) Acceptance by volume of production and acceptance by volume of distribution of not less than 60 percent in each case: *Provided,* That the Department shall disregard acceptance by volume of production or acceptance by volume of distribution or both unless, in the judgment of the Department, accurate figures for the volume of production or distribution are reasonably available and an evaluation of either or both of such acceptances is deemed necessary by the Department.

(g) A recommended standard which fails to achieve the acceptance requirements of paragraph (f)(1) of this section, but which satisfies the acceptance criteria of paragraph (f)(2) of this section, shall be returned to the Standard Review Committee for reconsideration. The committee, by the affirmative vote of not less than three-quarters of all members eligible to vote, may resubmit the recommended standard without change to the Department with a recommendation that the standard be published as a Voluntary Product Standard. The Department shall then conduct a public rulemaking hearing in accordance with the requirements of law as set forth in section 553 of Title 5, United States Code, to assist it in determining whether publication of the standard is in the public interest. If the Department determines that publication of the standard is in the public interest, the standard shall be published as a Voluntary Product Standard.

§ 10.7 Procedure when a recommended standard is not supported by a consensus.

If the Department determines that a recommended standard is not supported by a consensus, the Department may:

(a) Return the recommended standard to the Standard Review Committee for further action, with or without suggestions;

(b) Terminate the development of the recommended standard under these procedures; or

(c) Take such other action as it may deem necessary or appropriate under the circumstances.

§ 10.8 Standing Committee.

(a) The Department shall establish and appoint the members of a Standing Committee prior to the publication of a standard. The committee may include members from the Standard Review Committee, and shall consist of qualified representatives of producers, distributors, and users or consumers of the product covered by the standard, and representatives of appropriate general interest groups such as municipal, State, and Federal agencies. When requested by the Standing Committee, the Department shall appoint one voting member from among the representatives of the Federal agencies, other than the Department of Commerce. When requested by the Standing Committee for PS 20–70, ''American Softwood Lumber Standard,'' the Department shall appoint two voting members from among the representatives of the Federal agencies, other than the Department of Commerce. All other representatives of Federal agencies shall be advisory nonvoting members of Standing Committees. (Alternates to committee members may be designated by the Department.) When deemed appropriate by the Department, project funds under § 10.2, may be made available to assure participation by consumer interests on the committee at required meetings.

(b) Appointments to a Standing Committee may not exceed a term of 5 years. However, the committee may be reconstituted by the Department whenever appropriate, and members may be reappointed by the Department to succeeding terms. Appointments to the committee will be terminated upon the withdrawal of the standard.

(c) The Department shall be responsible for the organization of the committee. Any formal operating procedures developed by the committee shall be subject to approval by the Department. The committee may conduct business either in a meeting or through correspondence, but only if a quorum participates. A quorum shall consist of two-thirds of all voting members of the committee. A majority of the voting members of the committee participating shall be required to approve any actions taken by the committee except for the approval of revisions of the standard which shall be governed by the provisions of § 10.5 (b), (c), and (d),

(d) The members of a Standing Committee should be knowledgeable about:

(1) The product or products covered by the standard;

(2) The standard itself; and

(3) Industry and trade practices relating to the standard.

(e) The committee shall:

(1) Keep itself informed of any advancing technology that might affect the standard;

(2) Provide the Department with interpretations of provisions of the standard upon request;

(3) Make recommendations to the Department concerning the desirability or necessity of revising or amending the standard;

(4) Receive and consider proposals to revise or amend the standard; and

(5) Recommend to the Department the revision or amendment of a standard.

§ 10.9 Publication of a standard.

A Voluntary Product Standard published by the department under these procedures shall be assigned an appropriate number for purposes of identification and reference. Public notice shall be given regarding the publication and identification of the standard. A voluntary standard by itself has no mandatory or legally binding effect. Any person may choose to use or not to use such a standard. Appropriate reference in contracts, codes, advertising, invoices, announcements, product labels, and the like may be made to a

Voluntary Product Standard published under these procedures. Such reference shall be in accordance with such policies as the Department may establish, but no product may be advertised or represented in any manner which would imply or tend to imply approval or endorsement of that product by the Department or by the Federal Government.

§10.10 Review of published standards.

(a) Each standard published under these or previous procedures shall be reviewed regularly to determine the feasibility of transferring sponsorship to a private standards-writing organization. While the Department encourages the development of standards to replace Voluntary Product Standards by private standards-writing organizations, withdrawal of a Voluntary Product Standard, which meets the requirements of §10.0(b), shall not be considered until a replacement standard is published.

(b) Each standard published under these or previous procedures shall be reviewed by the Department, with such assistance of the Standing Committee or others as may be deemed appropriate by the Department, within 5 years after initial issuance or last revision and at least every 5 years thereafter. The purpose of this review shall be to determine whether the standard has become obsolete, technically inadequate, no longer acceptable to or used by the industry, or inconsistent with law or established public policy.

(c) If any of the above conditions is found to exist, the Department shall initiate action to amend, revise, or withdraw the standard in accordance with §10.11 or §10.13. If none is found to exist, the standard shall be kept in effect provided adequate funding is maintained.

§10.11 Revision or amendment of a standard.

(a) A published standard shall be subject to revision or amendment when it is determined to be inadequate by its Standing Committee or by the Department of one or more of the following reasons or for any other appropriate reasons:

(1) Any portion of the standard is obsolete, technically inadequate, or no longer generally acceptable to or used by the industry;

(2) The standard or any part of it is inconsistent with law or established public policy; or

(3) The standard or any part of it is being used to mislead users or consumers or is determined to be against the interest of users, consumers, or the public in general.

(b) A revision of a standard shall be considered by the Department to include changes which are comprehensive in nature, which have a substantive effect on the standards, which change the level of performance or safety or the design characteristics of the product being standardized, or which cannot reasonably be injected into a standard without disturbing the general applicability of the standard. Each suggestion for revision shall be submitted by the Department to the Standing Committee for appropriate consideration. The Standing Committee shall serve the same functions in the revision of a standard as the Standard Review Committee serves in the development of a new standard. The processing of a revision of a standard shall be dependent upon the age of the standard as computed from its effective date and shall be accomplished as follows:

(1) A proposed revision of a standard older than 5 years at the time such proposed revision is submitted to the Standing Committee by the Department shall be processed as a new standard under these procedures and, when approved for publication, the standard shall be republished and reidentified to indicate the year in which the revision became effective. The revised standard shall supersede the previously published standard.

(2) A proposed revision of a standard less than 5 years at the time such proposed revision is submitted to the Standing Committee by the Department shall be processed as a new standard except that:

(i) Distribution for acceptance or rejection shall be made to an appropriate list of producers, distributors, and users and consumers compiled by the Department;

(ii) If the revision affects only one subsection of the requirement section and/or only one subsection of the test methods section, it may be circulated separately for determining consensus and subsequently published as an addendum to the standard with appropriate dissemination and public notice of the addendum; and

(iii) If the revision does not change the level of performance or safety or the design characteristics of the product being standardized, the standard need not be reidentified.

(c) An amendment to a standard shall be considered by the Department to be any non-editorial change which is not comprehensive in nature, which has no substantive effect on the standard, which does not change the level of performance or safety or the design characteristics of the product being standardized, and which reasonably can be injected into a standard without disturbing the general applicability of the standard. Each suggestion for amendment shall be submitted by the Department to the Standing Committee for appropriate consideration. An amendment to a standard recommended by not less than 90 percent of the members of the committee eligible to vote and found acceptable by the Department, shall be published as an addendum (until the standard is republished) and distributed to acceptors of record. Public notice of the amendment shall be given and copies of the amendment shall be distributed to those filing written requests.

§ 10.12 Editorial changes.

The Department may, without prior notice, make such editorial or other minor changes as it deems necessary to reduce ambiguity or to improve clarity in any proposed, recommended, or published standard, or revision or amendment thereof.

§ 10.13 Withdrawal of a published standard.

(a) Standards published under these and previous procedures may be withdrawn by the Director of the National Institute of Standards & Technology at any time. Such action will be taken if, after consultation with the Standing Committee as provided in paragraph (a)(1) of this section and after public notice, the Director determines that the standard is: Obsolete; technically inadequate; no longer generally acceptable to and used by the industry; inconsistent with law or established public policy; not in the public interest; or otherwise inappropriate; and revision or amendment is not feasible or would serve no useful purpose. Additionally, a standard may be withdrawn if it cannot be demonstrated that a particular standard has substantial public impact, that it does not duplicate a standard published by a private standards-writing organization, or that lack of government sponsorship would result in significant public disadvantage for legal reasons or for reasons of domestic and international trade. The Director may withdraw a standard if costs to maintain such a standard are not reimbursed by the proponent or other government agencies.

(1) Before withdrawing a standard published under these procedures, the Director will review the relative advantages and disadvantages of amendment, revision, development of a new standard, or withdrawal with the members of the Standing Committee, if such committee was appointed or reappointed within the previous five years.

(2) Public notice of intent to withdraw an existing standard published under these procedures shall be given and a 30-day period will be provided for the filing with the Director or written objections to the withdrawal. Such objections will be considered and analyzed by the Director before a determination is made to withdraw the standard. If the Director determines that a particular standard does not meet the criteria set out in § 10.0(b), the standard will be withdrawn.

(b) The filing under paragraph (a) of this section of a request to retain a standard or standards shall operate to stay the withdrawal of such standard or standards until the Director's determination has been made. If the Director determines that the requested standard or standards shall be withdrawn, the stay will remain in effect, if an appeal is filed in accordance with the requirements of § 10.14, until the decision of the Director is announced in

the FEDERAL REGISTER. If, however, no appeal is received, the Director shall announce withdrawal of the particular standard or standards.

(c) Notice of the withdrawal action will be published in the FEDERAL REGISTER and such withdrawal will take effect 60 days from the date the withdrawal notice is published.

[51 FR 22497, June 20, 1986, as amended at 55 FR 38315, Sept. 18, 1990]

§10.14 Appeals.

(a) Any person directly affected by a procedural action taken by NIST or the Standard Review Committee under §§10.5, 10.6 or 10.7 regarding the development of a standard, by NIST or the Standing Committee under §10.10 regarding the review of a published standard, or under §10.11 regarding the revision of a standard, or under §10.13 regarding the withdrawal of a standard, may appeal such action.

(b) Such appeal shall be filed in written form with the body taking the action complained of (NIST, the Standard Review Committee, or the Standing Committee) within 30 days after the date of announcement of the action.

(c) If appeal is filed with the Standard Review Committee or the Standing Committee, the Committee shall attempt to resolve the appeal informally. If the appeal is filed with NIST, NIST with the consultation and advice of the Standard Review Committee or the Standing Committee, whichever is appropriate, shall attempt to resolve the appeal informally.

(d) If the appeal is to the Standard Review Committee or the Standing Committee and the Committee is unable to resolve such an appeal informally, the Committee shall hold a hearing regarding the appeal. Announcement of the hearing shall be made to members of the Standard Review Committee or the Standing Committee and all the acceptors of record, when appropriate, as well as other known interests. Notice of the hearing shall be published in the FEDERAL REGISTER. The hearing will be an informal, nonadversary proceeding at which there will be no formal pleadings or adverse parties. Written statements will be furnished by witnesses prior to the hearing. A record of the hearing will be made. Copies of the written statements and the record of the hearing will be available at cost.

(e) Those members of the Committee hearing the appeal will develop a recommendation to the Committee concerning the resolution of the appeal. NIST will review the recommendation and if found acceptable will subject it to a letter ballot of the Committee. Approval by three-fourths of the members of the Committee eligible to vote will constitute acceptance by the Committee and by NIST. Notice of the Committee decision will be published in the FEDERAL REGISTER.

(f) If the appeal is to NIST and the attempt to resolve the appeal informally under paragraph (c) of this section is not successful, the Deputy Director of NIST will schedule a hearing with an appeals panel at an appropriate location. Announcement of the hearing shall be made to members of the Standard Review Committee or Standing Committee and all acceptors of record, when appropriate, as well as to other known interests. Notice of the hearing shall be published in the FEDERAL REGISTER.

(g) The Deputy Director of NIST will name two other persons, who have not been directly involved in the matter in dispute and who will not be directly or materially affected by any decision made or to be made in the dispute, to sit on the panel with the Deputy Director, who will act as presiding officer. The presiding officer will have the right to exercise such authority as necessary to ensure the equitable and efficient conduct of the hearing and to maintain an orderly proceeding.

(h) The hearing will be an informal, nonadversary proceeding at which there will be no formal pleadings or adverse parties. The hearing will be open to the public. Witnesses shall submit a written presentation for the record seven days prior to the hearing. A record will be made of the hearing. Copies of the written statements and the record of the hearing will be available at cost.

(i) The appeals panel will make a recommendation to the Director of NIST. The Director's decision on the appeal

will be announced within 60 days following the hearing and will be communicated to the complainant and other interested parties by letter. Notice of the Director's decision shall be published in the FEDERAL REGISTER.

[51 FR 22497, June 20, 1986, as amended at 55 FR 38315, Sept. 18, 1990]

§ 10.15 Interpretations.

(a) An interpretation of a Voluntary Product Standard may be obtained through the submission of a written request. The request shall identify the specific section of the standard involved.

(b) In the case of PS 20–70, the ''American Softwood Lumber Standard,'' interpretations shall be made by the American Lumber Standards Committee (ALSC) under the procedures developed by the ALSC and found acceptable to NIST.

(c) In the case of the other Voluntary Product Standards, interpretations shall be made by the appropriate Standing Committees under procedures developed by those committees and found acceptable to NIST.

[51 FR 22497, June 20, 1986, as amended at 55 FR 38315, Sept. 18, 1990]

§ 10.16 Effect of procedures.

Nothing contained in these procedures shall be deemed to apply to the development, publication, revision, amendment, or withdrawal of any standard which is not identified as a ''Voluntary Product Standard'' by the Department. The authority of the Department with respect to engineering standards activities generally, including the authority to publish appropriate recommendations not identified as ''Voluntary Product Standards,'' is not limited in any way by these procedures.

PART 11—UNIFORM RELOCATION ASSISTANCE AND REAL PROPERTY ACQUISITION FOR FEDERAL AND FEDERALLY ASSISTED PROGRAMS

AUTHORITY: Section 213, Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, Pub. L. 91–646, 84 Stat. 1894 (42 U.S.C. 4601) as amended by the Surface Transportation and Uniform Relocation Assistance Act of 1987, Title IV of Pub. L. 100–17, 101 Stat. 246–256 (42 U.S.C. 4601 note).

EDITORIAL NOTE: For additional information, see related documents published at 50 FR 8953, Mar. 5, 1985, 52 FR 18768, May 19, 1987, and 52 FR 45667, Dec. 1, 1987.

§ 11.1 Uniform relocation and real property acquisition.

Regulations and procedures for complying with the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (Pub. L. 91–646, 84 Stat. 1894, 42 U.S.C. 4601), as amended by the Surface Transportation and Uniform Relocation Assistance Act of 1987 (Title IV of Pub. L. 100–17, 101 Stat. 246–255, 42 U.S.C. 4601 note) are set forth in 49 CFR Part 24.

[52 FR 48018, Dec. 17, 1987 and 54 FR 8912, 8913, Mar. 2, 1989]

PART 12—FAIR PACKAGING AND LABELING

Sec.
12.1 Introduction.
12.2 Undue proliferation.
12.3 Development of voluntary product standards.
12.4 Report to the Congress.

AUTHORITY: Secs. 5(d), 5(e), 80 Stat. 1298, 15 U.S.C. 1454; sec. 3, Dept. Order 177 (31 FR 6746), as amended (32 FR 3110).

SOURCE: 32 FR 11074, July 29, 1967, unless otherwise noted.

§ 12.1 Introduction.

(a) These procedures apply to the discharge of the responsibility given to the Secretary of Commerce by sections 5(d) and 5(e) of the Fair Packaging and Labeling Act (Pub. L. 89–755, 80 Stat. 1299), hereinafter called the ''Act''. The word ''Secretary'', as used hereinafter, shall refer to the Secretary of Commerce or his authorized delegate.

(b) The Secretary does not have the responsibility or the authority under the Act to issue any regulations governing the packaging or labeling practices of private industry.

(c) The Secretary does have the responsibility and authority to:

(1) Determine whether the reasonable ability of consumers to make value

comparisions with respect to any consumer commodity or reasonably comparable consumer commodities is impaired by undue proliferation of the weights, measures, or quantities in which such commodity or commodities are being distributed in packages for sale at retail.

(2) Request manufacturers, packers, and distributors, where a determination of undue proliferation has been made, to participate in the development of a voluntary product standard under the procedures governing the Department's voluntary standards program.

(3) Report to Congress with a recommendation as to whether legislation providing regulatory authority should be enacted, when after 1 year following the date private industry has been requested to participate in the development of a voluntary product standard it is determined that such a standard will not be published, or when following the publication of such a standard it is determined that the standard has not been observed.

(d) The Act does not furnish a detailed, definitive explanation of ''undue proliferation''. It does, however, point out that the condition of ''undue proliferation'' must be one which ''impairs the reasonable ability of consumers to make value comparisons'' with respect to consumer commodities. Generally, therefore, the Department will determine ''undue proliferation'' on a case-by-case basis, and, accordingly, is establishing by these procedures an orderly process for such determinations.

(e) As used hereinafter the term ''undue proliferation'' shall refer to such undue proliferation—of the weights, measures or quantities in which any consumer commodity or reasonably comparable consumer commodities are being distributed for sale at retail—as impairs the reasonable ability of consumers to make value comparisons with respect to such consumer commodity or commodities, as set out in section 5(d) of the Act.

§ 12.2 Undue proliferation.

(a) *Information as to possible undue proliferation.* Any person or group, including a State or local governmental entity, is invited to communicate information to the Secretary concerning the possible existence of undue proliferation. Such communications should be in writing and include supporting information and explanations.

(b) *Initiation of inquiry as to undue proliferation.* Upon receipt of information regarding the possible existence of undue proliferation, the Secretary will determine whether there has been a showing of good cause warranting an inquiry. If the Secretary determines that good cause exists, he shall initiate an inquiry for the purpose of finding facts concerning the existence of undue proliferation.

(c) *Procedures for inquiry*—(1) *Cooperation with State and local officials.* Any inquiry initiated under paragraph (b) of this section may be conducted in cooperation with State and local weights and measures officials.

(2) *Participation by interested persons.* The Secretary may, during the course of the inquiry, afford interested persons or groups an opportunity to submit in writing comments, data, arguments, views, or other information relevant to the inquiry.

(d) *Proposed determination as to existence of undue proliferation.* (1) If, after consideration of all relevant information, the Secretary concludes that undue proliferation appears to exist, he shall publish a proposed determination to this effect. The proposed determination shall identify the particular consumer commodity or commodities involved and shall be accompanied by a concise statement of the facts upon which it is based.

(2) Within 60 days after publication of the proposed determination, any interested party may submit in writing comments, data, arguments, views, or other information relevant to the proposed determination. All written submissions shall be made a part of the public record.

(3) Within 30 days after the proposed determination has been published, any interested party may request in writing an oral hearing to present his views. The granting of such a hearing shall be at the discretion of the Secretary. Any such hearing shall be public and notice thereof shall be published at least 15 days in advance. A

transcript of the hearing shall be made part of the public record.

(e) *Final determination as to undue proliferation.* As soon as practicable following the conclusion of the proceedings described in paragraph (d) of this section, the Secretary shall either publish a final determination of undue proliferation, or he shall publish a notice withdrawing his proposed determination of undue proliferation. In no event shall the withdrawal of a proposed determination operate to preclude the initiation of another inquiry regarding the same or similar subject matter under paragraph (b) of this section.

§ 12.3 Development of voluntary product standards.

(a) *Invitation to participate in the development of a voluntary product standard.* Whenever the Secretary publishes a final determination of undue proliferation under § 12.2(e), he shall invite manufacturers, packers, and distributors of the commodity or commodities involved to participate in the development of a voluntary product standard in accordance with the terms of the Act and the Department's published procedures for voluntary product standards. The term ''Voluntary Product Standard'' as used in this section means a standard for weights, measures or quantities in which the commodity or commodities are being distributed in packages for sale at retail.

(b) *Determination that voluntary product standard will not be published.* (1) If a voluntary product standard has not been developed within one year from the date on which participation was invited, the Secretary may conclude that a voluntary product standard will not likely be published. Upon reaching such a conclusion, the Secretary will publish a proposed determination that a voluntary product standard will not be published.

(2) Within 60 days after publication of the proposed determination, any interested party may submit in writing comments, data, arguments, views, or other information relevant to the proposed determination. All written submissions shall be made a part of the public record.

(3) Within 30 days after the proposed determination has been published, any interested party may request in writing an oral hearing to present his views. The granting of such a hearing shall be at the discretion of the Secretary. Any such hearing shall be public and notice thereof shall be published at least 15 days in advance. A transcript of the hearing shall be made part of the public record.

(4) As soon as practicable following the conclusion of the proceedings described in paragraphs (b)(2) and (3) of this section, the Secretary shall either publish a final determination that a voluntary product standard will not be published, or he shall publish a notice withdrawing his proposed determination under paragraph (b)(1) of this section. In no event shall the withdrawal of a proposed determination operate to preclude the publication of another proposed determination under paragraph (b)(1) of this section with respect to the same or similar subject matter.

(c) *Determination that a published voluntary product standard has not been observed.* (1) Whenever the Secretary has reason to believe that a voluntary product standard published under these procedures is not being observed he shall initiate an inquiry to determine such fact.

(2) If, on the basis of the information developed during the inquiry, the Secretary concludes that the voluntary product standard is not being observed, he shall publish a proposed determination to this effect. The proposed determination shall identify the particular standard involved and shall be accompanied by a concise statement of the facts upon which it is based.

(3) Within 60 days after publication of the proposed determination, any interested party may submit in writing comments, data, arguments, views, or other information relevant to the proposed determination. All written submissions shall be made a part of the public record.

(4) Within 30 days after the proposed determination has been published, any interested party may request in writing an oral hearing to present his views. The granting of such a hearing shall be at the discretion of the Secretary. Any such hearing shall be public and notice thereof shall be published at least 15 days in advance. A

transcript of the hearing shall be made part of the public record.

(5) As soon as practicable following the conclusion of the proceedings described in paragraphs (c)(3) and (4) of this section, and upon consideration of all relevant information, the Secretary shall either publish a final determination that the voluntary product standard is not being observed, or he shall publish a notice withdrawing his proposed determination under paragraph (c)(2) of this section. In no event shall the withdrawal of a proposed determination operate to preclude the initiation of another inquiry regarding the same standard under paragraph (c)(1) of this section.

§12.4 Report to the Congress.

Whenever the Secretary publishes a final determination under §12.3(b)(4) or §12.3(c)(5), he shall promptly report such determination to the Congress with a statement of the efforts that have been made under the voluntary standards program and his recommendation as to whether Congress should enact legislation providing regulatory authority to deal with the situation in question.

PART 13—INTERGOVERNMENTAL REVIEW OF DEPARTMENT OF COMMERCE PROGRAMS AND ACTIVITIES

Sec.

13.1 Purpose.
13.2 Definitions.
13.3 Programs and activities of the Department subject to the regulations.
13.4 General responsibilities under the Order.
13.5 Obligations with respect to Federal interagency coordination.
13.6 State selection of programs and activities.
13.7 Communication with state and local officials concerning the Department's programs and activities.
13.8 Opportunity to comment on proposed Federal financial assistance and direct Federal development.
13.9 Receipt of and response to comments.
13.10 Accommodation of intergovernmental concerns.
13.11 Obligations in interstate situations.

AUTHORITY: Executive Order 12372, July 14, 1982, 47 FR 30959, as amended April 8, 1983, 48 FR 15587, sec. 401, Intergovernmental Cooperation Act of 1968, as amended (31 U.S.C. 6506); sec. 204, Demonstration Cities and Metropolitan Development Act of 1966 as amended (42 U.S.C. 3334).

SOURCE: 48 FR 29134, June 24, 1983, unless otherwise noted.

EDITORIAL NOTE: For additional information, see related documents published at 47 FR 57369, December 23, 1982, 48 FR 17101, April 21, 1983, and 48 FR 29096, June 24, 1983.

§13.1 Purpose.

(a) The regulations in this part implement Executive Order 12372, ''Intergovernmental Review of Federal Programs,'' issued July 14, 1982 and amended on April 8, 1983. These regulations also implement applicable provisions of section 401 of the Intergovernmental Cooperation Act of 1968 and section 204 of the Demonstration Cities and Metropolitan Development Act of 1966.

(b) These regulations are intended to foster an intergovernmental partnership and a strengthened Federalism by relying on state processes and on state, areawide, regional and local coordination for review of proposed Federal financial assistance and direct Federal development.

(c) These regulations are intended to aid the internal management of the Department, and are not intended to create any right or benefit enforceable at law by a party against the Department or its officers.

§13.2 Definitions.

Department means the U.S. Department of Commerce.

Order means Executive Order 12372, issued July 14, 1982, and amended April 8, 1983 and titled ''Intergovernmental Review of Federal Programs.''

Secretary means the Secretary of the U.S. Department of Commerce or an official or employee of the Department acting for the Secretary under a delegation of authority.

State means any of the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, Guam, American Samoa, the U.S. Virgin Islands, or the Trust Territory of the Pacific Islands.

§ 13.3 Programs and activities of the Department subject to the regulations.

The Secretary publishes in the FEDERAL REGISTER a list of the Department's programs and activities that are subject to these regulations and identifies which of these are subject to the requirements of section 204 of the Demonstration Cities and Metropolitan Development Act.

§ 13.4 General responsibilities under the Order.

(a) The Secretary provides opportunities for consultation by elected officials of those state and local governments that would provide the non-Federal funds for, or that would be directly affected by, proposed Federal financial assistance from, or direct Federal development by, the Department.

(b) If a state adopts a process under the Order to review and coordinate proposed Federal financial assistance and direct Federal development, the Secretary, to the extent permitted by law:

(1) Uses the state process to determine official views of state and local elected officials;

(2) Communicates with state and local elected officials as early in a program planning cycle as is reasonably feasible to explain specific plans and actions;

(3) Makes efforts to accommodate state and local elected officials' concerns with proposed Federal financial assistance and direct Federal development that are communicated through the state process;

(4) Allows the states to simplify and consolidate existing federally required state plan submissions;

(5) Where state planning and budgeting systems are sufficient and where permitted by law, encourages the substitution of state plans for federally required state plans;

(6) Seeks the coordination of views of affected state and local elected officials in one state with those of another state when proposed Federal financial assistance or direct Federal development has an impact on interstate metropolitan urban centers or other interstate areas; and

(7) Supports state and local governments by discouraging the reauthorization or creation of any planning organization which is federally-funded, which has a limited purpose, and which is not adequately representative of, or accountable to, state or local elected officials.

§ 13.5 Obligations with respect to Federal interagency coordination.

The Secretary, to the extent practicable, consults with and seeks advice from all other substantially affected Federal departments and agencies in an effort to assure full coordination between such agencies and the Department regarding programs and activities covered under these regulations.

§ 13.6 State selection of programs and activities.

(a) A state may select any program or activity published in the FEDERAL REGISTER in accordance with § 13.3 of this part for intergovernmental review under these regulations. Each state, before selecting programs and activities, shall consult with local elected officials.

(b) Each state that adopts a process shall notify the Secretary of the Department's programs and activities selected for that process.

(c) A state may notify the Secretary of changes in its selections at any time. For each change, the state shall submit to the Secretary an assurance that the state has consulted with elected local elected officials regarding the change. The Department may establish deadlines by which states are required to inform the Secretary of changes in their program selections.

(d) The Secretary uses a state's process as soon as feasible, depending on individual programs and activities, after the Secretary is notified of its selections.

§ 13.7 Communication with state and local officials concerning the Department's programs and activities.

(a) For those programs and activities covered by a state process under § 13.6, the Secretary, to the extent permitted by law:

(1) Uses the state process to determine views of state and local elected officials; and,

(2) Communicates with state and local elected officials, through the state process, as early in a program planning cycle as is reasonably feasible to explain specific plans and actions.

(b) The Secretary provides notice to directly affected state, areawide, regional, and local entities in a state of proposed Federal financial assistance or direct Federal development if:

(1) The state has not adopted a process under the Order; or

(2) The assistance or development involves a program or activity not selected for the state process. This notice may be made by publication in the FEDERAL REGISTER or other appropriate means, which the Department in its discretion deems appropriate.

§13.8 Opportunity to comment on proposed Federal financial assistance and direct Federal development.

(a) Except in unusual circumstances, the Secretary gives state processes or directly affected state, areawide, regional and local officials and entities at least:

(1) 30 days from the date established by the Secretary to comment on proposed Federal financial assistance in the form of noncompeting continuation awards; and

(2) 60 days from the date established by the Secretary to comment on proposed direct Federal development or Federal financial assistance other than noncompeting continuation awards.

(b) This section also applies to comments in cases in which the review, coordination, and communication with the Department have been delegated.

(c) Applicants for programs and activities subject to section 204 of the Demonstration Cities and Metropolitan Act shall allow areawide agencies a 60-day opportunity for review and comment.

§13.9 Receipt of and response to comments.

(a) The Secretary follows the procedures in §13.10 if:

(1) A state office or official is designated to act as a single point of contact between a state process and all Federal agencies; and

(2) That office or official transmits a state process recommendation for a program selected under §13.6.

(b)(1) The single point of contact is not obligated to transmit comments from state, areawide, regional or local officials and entities where there is no state process recommendation.

(2) If a state process recommendation is transmitted by a single point of contact, all comments from state, areawide, regional, and local officials and entities that differ from it must also be transmitted.

(c) If a state has not established a process, or is unable to submit a state process recommendation, state, areawide, regional and local officials and entities may submit comments either to the applicant or to the Department.

(d) If a program or activity is not selected for a state process, state, areawide, regional and local officials and entities may submit comments either to the applicant or to the Department. In addition, if a state process recommendation for a nonselected program or activity is transmitted to the Department by the single point of contact, the Secretary follows the procedures of §13.10 of this part.

(e) The Secretary considers comments which do not constitute a state process recommendation submitted under these regulations and for which the Secretary is not required to apply the procedures of §13.10 of this part, when such comments are provided by a single point of contact, by the applicant, or directly to the Department by a commenting party.

§13.10 Accommodation of intergovernmental concerns.

(a) If a state process provides a state process recommendation to the Department through its single point of contact, the Secretary either:

(1) Accepts the recommendation;

(2) Reaches a mutually agreeable solution with the state process; or

(3) Provides the single point of contact with a written explanation of the decision in such form as the Secretary in his or her discretion deems appropriate. The Secretary may also supplement the written explanation by providing the explanation to the single

point of contact by telephone, other telecommunication, or other means.

(b) In any explanation under paragraph (a)(3) of this section, the Secretary informs the single point of contact that:

(1) The Department will not implement its decision for at least ten days after the single point of contact receives the explanation; or

(2) The Secretary has reviewed the decision and determined that, because of unusual circumstances, the waiting period of at least ten days is not feasible.

(c) For purposes of computing the waiting period under paragraph (b)(1) of this section, a single point of contact is presumed to have received written notification 5 days after the date of mailing of such notification.

§ 13.11 Obligations in interstate situations.

(a) The Secretary is responsible for:

(1) Identifying proposed Federal financial assistance and direct Federal development that have an impact on interstate areas;

(2) Notifying appropriate officials and entities in states which have adopted a process and which select the Department's program or activity.

(3) Making efforts to identify and notify the affected state, areawide, regional, and local officials and entities in those states that have not adopted a process under the Order or do not select the Department's program or activity;

(4) Responding pursuant to § 13.10 of this part if the Secretary receives a recommendation from a designated areawide agency transmitted by a single point of contact, in cases in which the review, coordination, and communication with the Department have been delegated.

(b) The Secretary uses the procedures in § 13.10 if a state process provides a state process recommendation to the Department through a single point of contact.

PART 14—[RESERVED]

PART 15—LEGAL PROCEEDINGS

Subpart A—Service of Process

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Subpart D—Statement of Policy and Procedures Regarding Indemnification of Department of Commerce Employees

15.31 Policy.
15.32 Procedures for the handling of lawsuits against Department employees arising within the scope of their office or employment.

AUTHORITY: 5 U.S.C. 301; 15 U.S.C. 1501, 1512, 1513, 1515 and 1518; Reorganization Plan No. 5 of 1950; 3 CFR, 1949–1953 Comp., p. 1004; 44 U.S.C. 3101; subpart C is issued under 37 U.S.C. 101, 706; 15 U.S.C. 1673; 42 U.S.C. 665.

EDITORIAL NOTE: Nomenclature changes to part 15 appear at 62 FR 19669, Apr. 23, 1997.

Subpart A—Service of Process

SOURCE: 53 FR 41318, Oct. 21, 1988, unless otherwise noted. Redesignated at 62 FR 19669, Apr. 23, 1997.

§15.1 Scope and purpose.

(a) This subpart sets forth the procedures to be followed when a summons or complaint is served on the Department, a component, or the Secretary or a Department employee in his or her official capacity.

(b) This subpart is intended to ensure the orderly execution of the affairs of the Department and not to impede any legal proceeding.

(c) This subpart does not apply to subpoenas. The procedures to be followed with respect to subpoenas are set out in subpart B.

(d) This subpart does not apply to service of process made on a Department employee personally on matters not related to official business of the Department or to the official responsibilities of the Department employee.

[53 FR 41318, Oct. 21, 1988. Redesignated and amended at 62 FR 19669, 19670, Apr. 23, 1997]

§15.2 Definitions.

For the purpose of this subpart:

(a) *General Counsel* means the General Counsel of the United States Department of Commerce or other Department employee to whom the General Counsel has delegated authority to act under this subpart, or the chief legal officer (or designee) of the Department of Commerce component concerned.

(b) *Component* means Office of the Secretary or an operating unit of the Department as defined in Department Organization Order 1–1.

(c) *Department* means the Department of Commerce.

(d) *Department employee* means any officer or employee of the Department, including commissioned officers of the National Oceanic and Atmospheric Administration.

(e) *Legal proceeding* means a proceeding before a tribunal constituted by law, including a court, an administrative body or commission, or an administrative law judge or hearing officer.

(f) *Official business* means the authorized business of the Department.

(g) *Secretary* means Secretary of Commerce.

§15.3 Acceptance of service of process.

(a) Except as otherwise provided in this subpart, any summons or complaint to be served in person or by registered or certified mail or as otherwise authorized by law on the Department, a component or the Secretary or a Department employee in their official capacity, shall be served on the General Counsel of the United States Department of Commerce, Washington, DC 20230.

(b) Any summons or complaint to be served in person or by registered or certified mail or as otherwise authorized by law on the Patent and Trademark Office or the Commissioner of Patents and Trademarks or an employee of the Patent and Trademark Office in his or her official capacity, shall be served on the Solicitor for the Patent and Trademark Office or a Department employee designated by the Solicitor.

(c) Except as otherwise provided in this subpart, any component or Department employee served with a summons or complaint shall immediately notify and deliver the summons or complaint to the office of the General Counsel. Any employee of the Patent and Trademark Office served with a summons or complaint shall immediately notify and deliver the summons or complaint to the office of the Solicitor.

(d) Any Department employee receiving a summons or complaint shall note on the summons or complaint the date, hour, and place of service and whether service was by personal delivery or by mail.

(e) When a legal proceeding is brought to hold a Department employee personally liable in connection with an action taken in the conduct of official business, rather than liable in an official capacity, the Department employee by law is to be served personally with process. Service of process in this case is inadequate when made upon the General Counsel or the Solicitor or their designees. Except as otherwise provided in this subpart, a Department employee sued personally for an action taken in the conduct of official business shall immediately notify and

deliver a copy of the summons or complaint to the office of the General Counsel. Any employee of the Patent and Trademark Office sued personally for an action taken in the conduct of official business shall immediately notify and deliver a copy of the summons or complaint to the Office of the Solicitor.

(f) A Department employee sued personally in connection with official business may be represented by the Department of Justice at its discretion. See 28 CFR 50.15 and 50.16 (1987).

(g) The General Counsel or Solicitor or Department employee designated by either, when accepting service of process for a Department employee in an official capacity, shall endorse on the Marshal's or server's return of service form or receipt for registered or certified mail the following statement: ''Service accepted in official capacity only.'' The statement may be placed on the form or receipt with a rubber stamp.

(h) Upon acceptance of service or receiving notification of service, as provided in this section, the General Counsel and Solicitor shall take appropriate steps to protect the rights of the Department, component, the Secretary or Department employee involved.

Subpart B—Testimony by Employees and the Production of Documents in Legal Proceedings

SOURCE: 60 FR 9291, Feb. 17, 1995, unless otherwise noted. Redesignated at 62 FR 19669, Apr. 23, 1997.

§ 15.11 Scope.

(a) This subpart sets forth the policies and procedures of the Department of Commerce regarding the testimony of employees, and former employees, as witnesses in legal proceedings and the production or disclosure of information contained in Department of Commerce documents for use in legal proceedings pursuant to a request, order, or subpoena (collectively referred to in this subpart as a ''demand'').

(b) This subpart does not apply to any legal proceeding in which an employee is to testify while on leave status, regarding facts or events that are unrelated to the official business of the Department.

(c) This subpart in no way affects the rights and procedures governing public access to records pursuant to the Freedom of Information Act, the Privacy Act or the Trade Secrets Act..

(d) This subpart is not intended to be relied upon to, and does not, create any right or benefit, substantive or procedural, enforceable at law by any party against the United States.

§ 15.12 Definitions.

For the purpose of this subpart:

(a) *Agency counsel* means the chief legal officer (or his/her designee) of an agency within the Department of Commerce.

(b) *Component* means Office of the Secretary or an operating unit of the Department as defined in Department Organization Order 1–1.

(c) *Demand* means a request, order, or subpoena for testimony or documents for use in a legal proceeding.

(d) *Department* means the United States Department of Commerce and its constituent agencies.

(e) *Document* means any record, paper and other property held by the Department, including without limitation, official letters, telegrams, memoranda, reports, studies, calendar and diary entries, maps, graphs, pamphlets, notes, charts, tabulations, analyses, statistical or informational accumulations, any kind of summaries of meetings and conversations, film impressions, magnetic tapes and sound or mechanical reproductions.

(f) *Employee* means all current or former employees or officers of the Department, including commissioned officers of the National Oceanic and Atmospheric Administration and any other individual who has been appointed by, or subject to the supervision, jurisdiction or control of the Secretary of the Department of Commerce.

(g) *General Counsel* means the General Counsel of the Department or other Department employee to whom the General Counsel has delegated authority to act under this subpart.

(h) *Legal proceeding* means all pretrial, trial and post trial stages of all

existing or reasonably anticipated judicial or administrative actions, hearings, investigations, or similar proceedings before courts, commissions, boards or other tribunals, foreign or domestic. This phrase includes all phases of discovery as well as responses to formal or informal requests by attorneys or others involved in legal proceedings.

(i) *Official business* means the authorized business of the Department.

(j) *Secretary* means the Secretary of the Department of Commerce.

(k) *Solicitor* means the Solicitor of the Patent and Trademark Office.

(l) *Testimony* means a statement in any form, including personal appearances before a court or other legal tribunal, interviews, depositions, telephonic, televised, or videotaped statements or any responses given during discovery or similar proceedings, which response would involve more than the production of documents.

(m) *United States* means the Federal Government, its departments and agencies, and individuals acting on behalf of the Federal Government.

§15.13 Demand for testimony or production of documents: Department policy.

No employee shall in response to a demand, produce any documents, or provide testimony regarding any information relating to, or based upon Department of Commerce documents, or disclose any information or produce materials acquired as part of the performance of that employee's official duties, or because of that employee's official status without the prior authorization of the General Counsel, or the Solicitor, or the appropriate agency counsel. The reasons for this policy are as follows:

(a) To conserve the time of Department employees for conducting official business;

(b) To minimize the possibility of involving the Department in controversial issues that are not related to the Department's mission;

(c) To prevent the possibility that the public will misconstrue variances between personal opinions of Department employees and Department policy;

(d) To avoid spending the time and money of the United States for private purposes;

(e) To preserve the integrity of the administrative process; and

(f) To protect confidential, sensitive information and the deliberative process of the Department.

§15.14 Demand for testimony or production of documents: Department procedures.

(a) Whenever a demand for testimony or for the production of documents is made upon an employee, the employee shall immediately notify the General Counsel (Room 5890, U. S. Department of Commerce, Washington, DC 20230, (202) 482–1067) or appropriate agency counsel. When a demand for testimony or for the production of documents is made upon an employee of the Patent and Trademark Office, the employee should immediately notify the Solicitor, by phone, (703) 305–9035; by mailed addressed Solicitor, Box 8, Patent and Trademark Office, Washington, DC 20231; or in person to 2121 Crystal Drive, Crystal Park 2, Suite 918, Arlington, Virginia 22215.

(b) A Department employee may not give testimony, produce documents, or answer inquiries from a person not employed by the Department regarding testimony or documents subject to a demand or a potential demand under the provisions of this subpart without the approval of the General Counsel, or the Solicitor, or the appropriate agency counsel. A Department employee shall immediately refer all inquiries and Demands to the General Counsel, or the Solicitor, or appropriate agency counsel. Where appropriate, the General Counsel, or the Solicitor, or appropriate agency counsel, may instruct the Department employee, orally or in writing, not to give testimony or produce documents.

(c)(1) *Demand for testimony or documents.* A demand for the testimony of a Department employee shall be addressed to the General Counsel, Room 5890, Department of Commerce, Washington, DC 20230 or appropriate agency counsel. A demand for testimony of an employee of the Patent and Trademark Office shall be mail addressed to the Solicitor, Box 8, Patent and Trademark

Office, Washington, DC 20231; or in person to 2121 Crystal Drive, Crystal Park 2, Suite 918, Arlington, Virginia 22215.

(2) *Subpoenas.* A subpoena for testimony by a Department employee or a document shall be served in accordance with the Federal Rules of Civil or Criminal Procedure or applicable state procedure and a copy of the subpoena shall be sent to the General Counsel, or the Solicitor, or appropriate agency counsel.

(3) *Affidavit.* Except when the United States is a party, every demand shall be accompanied by an affidavit or declaration under 28 U.S.C. 1746 or, if an affidavit is not feasible, a statement setting forth the title of the legal proceeding, the forum, the requesting party's interest in the legal proceeding, the reason for the demand, a showing that the desired testimony or document is not reasonably available from any other source, and if testimony is requested, the intended use of the testimony, a general summary of the desired testimony, and a showing that no document could be provided and used in lieu of testimony. The purpose of this requirement is to assist the General Counsel, or the Solicitor, or appropriate agency counsel in making an informed decision regarding whether testimony or the production of a document(s) should be authorized.

(d) A certified copy of a document for use in a legal proceeding may be provided upon written request and payment of applicable fees. Written requests for certification shall be addressed to the agency counsel for the component having possession, custody, or control of the document. Unless governed by another applicable provision of law or component regulation, the applicable fee includes charges for certification and reproduction as set out in 15 CFR part 4.9. Other reproduction costs and postage fees, as appropriate, must also be borne by the requester.

(e) The Secretary retains the authority to authorize and direct testimony in those cases where a statute or Presidential order mandates a personal decision by the Secretary.

(f) The General Counsel, or the Solicitor, or appropriate agency counsel may consult or negotiate with an attorney for a party or the party if not represented by an attorney, to refine or limit a demand so that compliance is less burdensome or obtain information necessary to make the determination required by paragraph (b) of this section. Failure of the attorney to cooperate in good faith to enable the General Counsel, or the Solicitor, or the Secretary, or the appropriate agency counsel to make an informed determination under this subpart may serve, where appropriate, as a basis for a determination not to comply with the demand.

(g) A determination under this subpart to comply or not to comply with a demand is not an assertion or waiver of privilege, lack of relevance, technical deficiency or any other ground for noncompliance.

(h) The General Counsel, or the Solicitor, or appropriate agency counsel may waive any requirements set forth under this section when circumstances warrant.

§ 15.15 Procedures when a Department employee receives a subpoena.

(a) A Department employee who receives a subpoena shall immediately forward the subpoena to the General Counsel, or the appropriate agency counsel. In the case of an employee of the Patent and Trademark Office, the subpoena shall immediately be forwarded to the Solicitor. The General Counsel, or the Solicitor, or appropriate agency counsel will determine the extent to which a Department employee will comply with the subpoena.

(b) If an employee is served with a subpoena that the General Counsel, or the Solicitor, or appropriate agency counsel determines should not be complied with, the General Counsel, Solicitor or appropriate agency counsel will attempt to have the subpoena withdrawn or modified. If this cannot be done, the General Counsel, Solicitor or appropriate agency counsel will attempt to obtain Department of Justice representation for the employee and move to have the subpoena modified or quashed. If, because of time constraints, this is not possible prior to the compliance date specified in the subpoena, the employee should appear at the time and place set forth in the

subpoena. If legal counsel cannot appear on behalf of the employee, the employee should produce a copy of the Department's regulations and inform the legal tribunal that he/she has been advised by counsel not to provide the requested testimony and/or produce documents. If the legal tribunal rules that the demand in the subpoena must be complied with, the employee shall respectfully decline to comply with the demand. *United States ex rel. Touhy* v. *Ragen,* 340 U. S. 462 (1951).

(c) Where the Department employee is an employee of the Office of the Inspector General, the Inspector General in consultation with the General Counsel, will make a determination under paragraphs (a) and (b) of this section.

§15.16 Legal proceedings between private litigants: Expert or opinion testimony.

In addition to the policies and procedures as outlined in §§15.11 through 15.16, the following applies to legal proceedings between private litigants:

(a) If a Department employee is authorized to give testimony in a legal proceeding not involving the United States, the testimony, if otherwise proper, shall be limited to facts within the personal knowledge of the Department employee. Employees, with or without compensation, shall not provide expert testimony in any legal proceedings regarding Department information, subjects or activities except on behalf of the United States or a party represented by the United States Department of Justice. However, upon a showing by the requester that there are exceptional circumstances and that the anticipated testimony will not be adverse to the interest of the Department or the United States, the General Counsel, or the Solicitor, or appropriate agency counsel may, in writing grant special authorization for the employee to appear and give the expert or opinion testimony.

(b)(1) If, while testifying in any legal proceeding, an employee is asked for expert or opinion testimony regarding official DOC information, subjects or activities, which testimony has not been approved in advance in accordance with the regulations in this subpart, the witness shall:

(i) Respectfully decline to answer on the grounds that such expert or opinion testimony is forbidden by the regulations in this subpart;

(ii) Request an opportunity to consult with the General Counsel, or the Solicitor, or appropriate agency counsel before giving such testimony; and

(iii) Explain that upon such consultation, approval for such testimony may be provided.

(2) If the witness is then ordered by the body conducting the proceeding to provide expert or opinion testimony regarding official DOC information, subjects or activities without the opportunity to consult with either the General Counsel, or the Solicitor, or appropriate agency counsel, the witness shall respectfully refuse to provide such testimony. See *United States ex rel. Touhy* v. *Ragen,* 340 U. S. 462 (1951).

(c) If an employee is unaware of the regulations in this subpart and provides expert or opinion testimony regarding official DOC information, subjects or activities in a legal proceeding without the aforementioned consultation, the witness shall, as soon after testifying as possible, inform the General Counsel, or the Solicitor, or appropriate agency counsel that such testimony was given and provide a written summary of the expert or opinion testimony provided.

[60 FR 9291, Feb. 17, 1995. Redesignated and amended at 62 FR 19669, 19670, Apr. 23, 1997]

§15.17 Demands or requests in legal proceedings for records protected by confidentiality statutes.

Demands in legal proceedings for the production of records, or for the testimony of Department employees regarding information protected by the Privacy Act, 5 U.S.C. 552a, the Trade Secrets Act, 18 U.S.C. 1905 or other confidentiality statutes, must satisfy the requirements for disclosure set forth in those statutes before the records may be provided or testimony given. The General Counsel, or the Solicitor, or appropriate agency counsel should first determine if there is a legal basis to provide the testimony or records sought under applicable confidentiality statutes before applying §§15.11

through 15.18. Where an applicable confidentiality statute mandates disclosure, §§15.11 through 15.18 will not apply.

[60 FR 9291, Feb. 17, 1995. Redesignated and amended at 62 FR 19669, 19670, Apr. 23, 1997]

§ 15.18 Testimony of Department employees in proceedings involving the United States.

The following applies in legal proceedings in which the United States is a party:

(a) A Department employee may not testify as an expert or opinion witness for any other party other than the United States.

(b) Whenever, in any legal proceeding involving the United States, a request is made by an attorney representing or acting under the authority of the United States, the General Counsel, or the Solicitor, or appropriate agency counsel will make all necessary arrangements for the Department employee to give testimony on behalf of the United States. Where appropriate, the General Counsel, or the Solicitor, or appropriate agency counsel may require reimbursement to the Department of the expenses associated with a Department employee giving testimony on behalf of the United States.

Subpart C—Involuntary Child and Spousal Support Allotments of NOAA Corps Officers

SOURCE: 53 FR 15548, May 2, 1988, unless otherwise noted. Redesignated at 62 FR 19669, Apr. 23, 1997.

§ 15.21 Purpose.

This subpart provides implementing policies governing involuntary child or child and spousal support allotments for officers of the uniformed service of the National Oceanic and Atmospheric Administration (NOAA), and prescribes applicable procedures.

§ 15.22 Applicability and scope.

This subpart applies to Commissioned Officers of the NOAA Corps on active duty.

§ 15.23 Definitions.

(a) *Active duty.* Full-time duty in the NOAA Corps.

(b) *Authorized person.* Any agent or attorney of any state having in effect a plan approved under part D of title IV of the Social Security Act (42 U.S.C. 651–664), who has the duty or authority to seek recovery of any amounts owed as child or child and spousal support (including, when authorized under the state plan, any official of a political subdivision); and the court that has authority to issue an order against a member for the support and maintenance of a child or any agent of such court.

(c) *Child support.* Periodic payments for the support and maintenance of a child or children, subject to and in accordance with state or local law. This includes but is not limited to, payments to provide for health, education, recreation, and clothing or to meet other specific needs of such a child or children.

(d) *Designated official.* The official who is designated to receive notices of failure to make payments from an authorized person (as defined in paragraph (b) of this section). For the Department of Commerce this official is the Assistant General Counsel for Administration.

(e) *Notice.* A court order, letter, or similar documentation issued by an authorized person providing notification that a member has failed to make periodic support payments under a support order.

(f) *Spousal support.* Periodic payments for the support and maintenance of a spouse or former spouse, in accordance with state and local law. It includes, but is not limited to, separate maintenance, alimony while litigation continues, and maintenance. Spousal support does not include any payment for transfer of property or its value by an individual to his or her spouse or former spouse in compliance with any community property settlement, equitable distribution of property, or other division of property between spouses or former spouses.

(g) *Support order.* Any order for the support of any person issued by a court of competent jurisdiction or by administrative procedures established under

state law that affords substantial due process and is subject to judicial review. A court of competent jurisdiction includes: (1) Indian tribal courts within any state, territory, or possession of the United States and the District of Columbia; and (2) a court in any foreign country with which the United States has entered into an agreement that requires the United States to honor the notice.

§15.24 Policy.

(a) It is the policy of the Department of Commerce to require Commissioned Officers of the NOAA Corps on active duty to make involuntary allotments from pay and allowances as payment of child, or child and spousal, support payments when the officer has failed to make periodic payments under a support order in a total amount equal to the support payable for two months or longer. Failure to make such payments shall be established by notice from an authorized person to the designated official. Such notice shall specify the name and address of the person to whom the allotment is payable. The amount of the allotment shall be the amount necessary to comply with the support order. If requested, the allotment may include arrearages as well as amounts for current support, except that the amount of the allotment, together with any other amounts withheld for support from the officer as a percentage of pay, shall not exceed the limits prescribed in section 303 (b) and (c) of the Consumer Credit Protection Act (15 U.S.C. 1673). An allotment under this subpart shall be adjusted or discontinued upon notice from an authorized person.

(b) Notwithstanding the above, no action shall be taken to require an allotment from the pay and allowances of any officer until such officer has had a consultation with an attorney from the Office of the Assistant General Counsel for Administration, in person, to discuss the legal and other factors involved with respect to the officer's support obligation and his/her failure to make payments. Where it has not been possible, despite continuing good faith efforts to arrange such a consultation, the allotment shall start the first pay period beginning after 30 days have elapsed since the notice required in paragraph (d)(1) of §15.25 is given to the affected officer.

[53 FR 15548, May 2, 1988. Redesignated and amended at 62 FR 19669, 19670, Apr. 23, 1997]

§15.25 Procedures.

(a) *Service of notice* (1) An authorized person shall send to the designated official a signed notice that includes:

(i) A statement that delinquent support payments equal or exceed the amount of support payable for 2 months under a support order, and a request that an allotment be initiated pursuant to 42 U.S.C. 665.

(ii) A certified copy of the support order.

(iii) The amount of the monthly support payment. Such amount may include arrearages, if a support order specifies the payment of such arrearages. The notice shall indicate how much of the amount payable shall be applied toward liquidation of the arrearages.

(iv) Sufficient information identifying the officer to enable processing by the designated official. The following information is requested:

(A) Full name;

(B) Social Security Number;

(C) Date of birth; and

(D) Duty station location.

(v) The full name and address of the allottee. The allottee shall be an authorized person, the authorized person's designee, or the recipient named in the support order.

(vi) Any limitations on the duration of the support allotment.

(vii) A certificate that the official sending the notice is an authorized person.

(viii) A statement that delinquent support payments are more than 12 weeks in arrears, if appropriate.

(2) The notice shall be accomplished by certified or registered mail, return receipt requested, or by personal service, upon the appropriate designated official, who shall note the date and time of receipt on the notice.

(3) The notice is effective when it is received in the office of the designated official.

(4) When the information submitted is not sufficient to identify the officer, the notice shall be returned directly to

the authorized person with an explanation of the deficiency. However, prior to returning the notice if there is sufficient time, an attempt should be made to inform the authorized person who caused the notice to be served, that it will not be honored unless adequate information is supplied.

(5) Upon receipt of effective notice of delinquent support payments, together with all required supplementary documents and information, the designated official shall identify the officer from whom moneys are due and payable. The allotment shall be established in the amount necessary to comply with the support order and to liquidate arrearages if provided by a support order when the maximum amount to be allotted under this provision, together with any other moneys withheld for support from the officer, does not exceed:

(i) 50 percent of the officer's disposable earnings for any month where the officer asserts by affidavit or other acceptable evidence, that he/she is supporting a spouse and/or dependent child, other than a party in the support order. When the officer submits evidence, copies shall be sent to the authorized person, together with notification that the officer's support claim will be honored.

If the support claim is contested by the authorized person, that authorized person may refer this matter to the appropriate court or other authority for resolution.

(ii) 60 percent of the officer's disposable earnings for any month where the officer fails to assert by affidavit or other acceptable evidence that he/she is supporting a spouse and/or dependent child.

(iii) Regardless of the limitations above, an additional 5 percent of the officer's disposable earnings shall be withheld when it is stated in the notice that the officer is in arrears in an amount equivalent to 12 or more weeks' support.

(b) *Disposable earnings.* The following moneys are subject to inclusion in computation of the officer's disposable earnings:

(1) Basic pay.

(2) Special pay (including enlistment and reenlistment bonuses).

(3) Accrued leave payments (basic pay portions only).

(4) Aviation career incentive pay.

(5) Incentive pay for Hazardous Duty.

(6) Readjustment pay.

(7) Diving pay.

(8) Sea pay.

(9) Severance pay (including disability severance pay).

(10) Retired pay (including disability retired pay).

(c) *Exclusions.* In determining the amount of any moneys due from or payable by the United States to any individual, there shall be excluded amounts which are:

(1) Owed by the officer to the United States.

(2) Required by law to be deducted from the remuneration or other payment involved, including, but not limited to:

(i) Amounts withheld from benefits payable under Title II of the Social Security Act where the withholding is required by law.

(ii) Federal employment taxes.

(3) Properly withheld for federal and state income tax purposes if the withholding of the amounts is authorized by law and if amounts withheld are not greater than would be the case if the individual claimed all dependents to which he/she were entitled. The withholding of additional amounts pursuant to section 3402(i) of Title 26 of the United States Code may be permitted only when the officer presents evidence of a tax obligation which supports the additional withholding.

(4) Deducted for servicemen's Group Life Insurance coverage.

(5) Advances of pay that may be due and payable by the officer at some future date.

(d) *Officer notification.* (1) As soon as possible, but not later than 15 calendar days after the date of receipt of notice, the designated official shall send to the officer, at his/her duty station or last known address, written notice:

(i) That notice has been received from an authorized person, including a copy of the documents submitted;

(ii) Of the maximum limitations set forth, with a request that the officer submit supporting affidavits or other

documentation necessary for determining the applicable percentage limitation;

(iii) That the officer may submit supporting affidavits or other documentation as evidence that the information contained in the notice is in error;

(iv) That by submitting supporting affidavits or other necessary documentation, the officer consents to the disclosure of such information to the party requesting the support allotment;

(v) Of the amount or percentage that will be deducted if the officer fails to submit the documentation necessary to enable the designated official to respond to the notice within the prescribed time limits;

(vi) That legal counsel will be provided by the Office of the Assistant General Counsel for Administration; and

(vii) Of the date that the allotment is scheduled to begin.

(2) The officer shall be provided with the following:

(i) A consultation in person with an attorney from the Office of the Assistant General Counsel for Administration, to discuss the legal and other factors involved with the officer's support obligation and his/her failures to make payment.

(ii) Copies of any other documents submitted with the notice.

(3) The Office of the Assistant General Counsel for Administration will make every effort to see that the officer receives a consultation concerning the support obligation and the consequences of failure to make payments within 30 days of the notice required in paragraph (d)(1). In the event such consultation is not possible, despite continuing good faith efforts to arrange a consultation, no action shall be taken to require an allotment from the pay and allowances of any NOAA Corps Officer until 30 days have elapsed after the notice described in paragraph (d)(1) is given to the affected officer.

(4) If, within 30 days of the date of the notice, the officer has furnished the designated official affidavits or other documentation showing the information in the notice to be in error, the designated official shall consider the officer's response. The designated official may return to the authorized person, without action, the notice for a statutorily required support allotment together with the member's affidavit and other documentation, if the member submits substantial proof of error, such as:

(i) The support payments are not delinquent.

(ii) The underlying support order in the notice has been amended, superseded, or set aside.

(e) *Absence of funds.* (1) When notice is served and the identified officer is found not to be entitled to moneys due from or payable by NOAA, the designated official shall return the notice to the authorized person, and advise that no moneys are due from or payable by NOAA to the named individual.

(2) Where it appears that moneys are only temporarily exhausted or otherwise unavailable, the authorized person shall be fully advised as to why, and for how long, the money will be unavailable.

(3) In instances where the officer separates from active duty service, the authorized person shall be informed by the Office of Commissioned Personnel, NOAA Corps that the allotment is discontinued.

(4) Payment of statutorily required allotments shall be enforced over other voluntary deductions and allotments when the gross amount of pay and allowances is not sufficient to permit all authorized deductions and collections.

(f) *Allotment of funds.* (1) The authorized person or allottee shall notify the designated official promptly if the operative court order upon which the allotment is based is vacated, modified, or set aside. The designated official shall also be notified of any events affecting the allottee's eligibility to receive the allotment, such as the former spouse's remarriage, if a part of the payment is for spousal support, and notice of a change in eligibility for child support payments under circumstances of death, emancipation, adoption, or attainment of majority of a child whose support is provided through the allotment.

(2) An allotment established under this Directive shall be adjusted or discontinued upon notice from the authorized person.

(3) Neither the Department of Commerce nor any officer or employee thereof, shall be liable for any payment made from moneys due from, or payable by, the Department of Commerce to any individuals pursuant to notice regular on its face, if such payment is made in accordance with this subpart. If a designated official receives notice based on support which, on its face, appears to conform to the law of the jurisdiction from which it was issued, the designated official shall not be required to ascertain whether the authority that issued the orde had obtained personal jurisdiction over the member.

(4) *Effective date of allotment.* The allotment shall start with the first pay period beginning after the officer has had a consultation with an attorney from the Office of the Assistant General Counsel for Administration but not later than the first pay period beginning after 30 days have elapsed since the notice required in paragraph (d)(1) of this section is given to the affected officer. The Department of Commerce shall not be required to vary its normal NOAA Corps allotment payment cycle to comply with the notice.

(g) *Designated official.* Notice should be sent to: The Assistant General Counsel for Administration, Office of the General Counsel, U.S. Department of Commerce, Washington, DC 20230, (202) 377–5387.

Subpart D—Statement of Policy and Procedures Regarding Indemnification of Department of Commerce Employees

SOURCE: 62 FR 19670, Apr. 23, 1997, unless otherwise noted.

§ 15.31 Policy.

(a) The Department of Commerce may indemnify a present or former Department employee who is personally named as a defendant in any civil suit in state or federal court, or other legal proceeding seeking damages against a present or former Department employee personally, for any verdict, judgment or other monetary award which is rendered against such employee, provided that the conduct giving rise to the verdict, judgment or award was taken within the scope of his/her employment and that such indemnification is in the interest of the Department as determined by the Secretary or his/her designee.

(b) The Department may settle or compromise a personal damage claim against a present or former employee by the payment of available funds at any time provided the alleged conduct giving rise to the personal property claim was taken within the employee's scope of employment and such settlement is in the interest of the Department as determined by the Secretary or his/her designee.

(c) Absent exceptional circumstances, as determined by the Secretary or his/her designee, the Department will not consider a request either to indemnify or to settle a personal damage claim before entry of an adverse verdict, judgment or award.

(d) Any payment under this section either to indemnify a present or former Department employee or to settle a personal damage claim shall be contingent upon the availability of appropriated funds of the Department of Commerce.

§ 15.32 Procedures for the handling of lawsuits against Department employees arising within the scope of their office or employment.

The following procedures shall be followed in the event that a civil action or proceeding is brought, in any court, against a present or former employee of the Department (or against his/her estate) for personal injury, loss of property or death, resulting from the Department employee's activities while acting within the scope of his/her office or employment:

(a) After being served with process or pleadings in such an action or proceeding, the employee (or the executor(rix) or administrator(rix)) of the estate shall within five (5) calendar days of receipt, deliver all such process and pleadings or an attested true copy thereof, together with a fully detailed report of the circumstances of the incident giving rise to the court action or proceeding to the General Counsel. Where appropriate, the General Counsel, or his/her designee, may request

that the Department of Justice provide legal representation for the present or former Department employee.

(b)(1) Only if a present or former employee of the Department has satisfied the requirements of paragraph (a) of this section in a timely fashion, may the employee subsequently request indemnification to satisfy a verdict, judgment, or award entered against that employee.

(2) No request for indemnification will be considered unless the employee has submitted a written request, with appropriate documentation, including copies of the verdict, judgment, appeal bond, award, or settlement proposal through the employee's supervisory chain to the head of the employee's component. The written request will include an explanation by the employee of how the employee was working within the scope of employment and whether the employee has insurance or any other source of indemnification.

(3) The head of the component or his/her designee will forward the employee's request with a recommendation to the General Counsel for review. The request for indemnification shall include a detailed analysis of the basis for the recommendation. The head of the component will also certify to the General Counsel that the component has funds available to pay the indemnification.

(c) The General Counsel or his/her designee will review the circumstances of the incident giving rise to the action or proceeding, and all data bearing upon the question of whether the employee was acting within the scope of his/her employment. Where appropriate, the agency shall seek the views of the Department of Justice and/or the U.S. Attorney for the district embracing the place where the action or proceeding is brought.

(d) The General Counsel shall forward the request, the accompanying documentation, and the General Counsel's recommendation to the Secretary or his/her designee for decision.

PART 16—PROCEDURES FOR A VOLUNTARY CONSUMER PRODUCT INFORMATION LABELING PROGRAM

Sec.

16.1 Purpose.
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16.14 Annual report.

AUTHORITY: Sec. 2, 31 Stat. 1449, as amended; sec. 1, 64 Stat. 371, (15 U.S.C. 272); Reorganization Plan No. 3 of 1946, Part VI.

SOURCE: 42 FR 26648, May 25, 1977, unless otherwise noted.

§16.1 Purpose.

The purpose of this part is to establish procedures under which a voluntary consumer product information labeling program administered by the Department of Commerce will function.

§16.2 Description and goal of program.

(a) The Department's Voluntary Consumer Product Information Labeling Program makes available to consumers, at the point of sale, information on consumer product performance in an understandable and useful form so as to facilitate accurate consumer purchasing decisions and enhance consumer satisfaction. It also educates consumers, distributors and retailers in the use of the product performance information displayed and provides manufacturers and other persons who participate in the program with an opportunity to convey to the public the

particular advantages of their products. These objectives are accomplished by:

(1) Selecting or developing standardized test methods by which selected product performance characteristics can be measured;

(2) Developing labeling methods by which information concerning product performance can be transmitted in useful form to consumers at the point of sale;

(3) Encouraging manufacturers and other participants in the program voluntarily to test and label their products according to the selected or developed methods; and

(4) Encouraging consumers through various informational and educational programs to utilize the product performance information provided.

(b) The program involves voluntary labeling by enrolled participants of selected categories of consumer products with information concerning selected performance characteristics of those products. The performance characteristics selected are those that are of demonstrable importance to consumers, that consumers cannot evaluate through mere inspection of the product, and that can be measured objectively and reported understandably to consumers. The consumer products covered include those for which incorrect purchase decision can result in financial loss, dissatisfaction, or inconvenience. The program seeks to avoid the duplication of other Federal programs under which performance characteristics are labeled by exempting those performance characteristics from this program. However, where the Federal agency concerned agrees, the Department of Commerce may include information about those performance characteristics in CPILP labels if, by doing so, product comparison at the point of sale is simplified for consumers, and the complexity of product labeling is reduced for the manufacturers by enabling them to comply with the labeling requirements of other Federal agencies through participation in CPILP.

(c) For selected categories of consumer products, the program includes advertising guidelines covering situations where quantitative performance values are stated in advertising or where qualitative comparisons are made of the performance of different products.

[42 FR 26648, May 25, 1977, as amended at 43 FR 8255, Mar. 1, 1978]

§ 16.3 Definitions.

(a) The term *Secretary* means the Secretary of Commerce or her designee.

(b) The term *consumer* means the first person who purchases a consumer product for purposes other than resale.

(c) The term *participant* means a manufacturer, assembler or private brand labeler of consumer products or an importer of such products for resale and who participates in the program.

(d) The term *consumer product* means any article produced or distributed for sale to a consumer for the use, consumption, or enjoyment of such consumer. The term does not include products customarily intended primarily for business, commercial, or industrial use.

(e) The term *person* means an individual; a manufacturer; distributor; retailer; importer; private brand labeler; government agency at the Federal (including any agency of the Department of Commerce), State and local level; consumer organization; trade association; standards writing body; professional society; testing laboratory; or educational institution.

(f) The term *performance characteristic* means a performance characteristic of a consumer product that can be measured in an objective manner with respect to a given consumer product.

(g) The term *Specification* means a Performance Information Labeling Specification developed under § 16.5.

(h) The term *label* means printed matter affixed to or otherwise provided with a consumer product and containing all of the performance characteristics as prescribed by the Specification applicable to that product.

(i) The term *designated agent* means a person as defined in paragraph (e) of this section, who has been designated by the Secretary to carry out appropriate operational procedures on behalf of more than one participant in this program in accordance with rules set out under § 16.9.

§16.4 Finding of need to establish a specification for labeling a consumer product.

(a) Any person may request the Secretary to find that there is a need to label a particular consumer product with information concerning one or more specific performance characteristics of that product.

(b) Such a request shall be in writing and will, to the extent practicable, include the following information:

(1) Identification of the consumer product;

(2) Extent that the product identified in paragraph (b)(1) of this section is used by the public and, if known, what the production or sales volume is of such product;

(3) Nature and extent of difficulty experienced by consumers in making informed purchase decisions because of a lack of knowledge regarding the performance characteristics of the identified consumer product;

(4) Potential or actual loss to consumers as a result of an incorrect decision based on an inadequate understanding of the performance characteristics of the identified consumer product;

(5) Extent of incidence of consumer complaints arising from or reasonably traceable to lack of knowledge regarding the performance characteristics of the identified consumer product;

(6) If known, whether there currently exist test methods which could be used to test the performance characteristics of the identified consumer product and an identification of those test methods;

(7) Reasons why it is felt, in cases where existing test methods are identified in responding to paragraph (b)(6) of this section, that such test methods are suitable for making objective measurements of the performance characteristics of the identified consumer product; and

(8) Estimated cost to participants to test and label the product.

(c) The Secretary may ask for more information to support a request made under paragraph (a) of this section if she feels it is necessary to do so, or, if she deems it to be in the public interest, may develop such information herself as by consultation on a one-time basis with consumers, consumer organizations, and others. The Secretary shall act expeditiously on all requests and shall notify the requester of her decision in writing. If the Secretary determines that there is no need to establish a Specification for labeling the requested consumer product performance characteristics, or because of a lack of resources, she will decline to act further on the request. In those instances where the Secretary declines a request, she shall state the reasons for so declining.

(d) If the Secretary finds that a need exists to establish a Specification for labeling a consumer product under this program, she shall publish a notice in the FEDERAL REGISTER setting out such finding and its basis and stating that she is developing a proposed Specification in accordance with §16.5.

§16.5 Development of performance information labeling specifications.

(a) If the Secretary makes a finding of need pursuant to §16.4, she will publish a proposed Performance Information Labeling Specification in the FEDERAL REGISTER with a notice giving the complete text of the proposed Specification and any other pertinent information. The notice will invite any interested person to submit written comments on the proposed Specification within 45 days after its publication in the FEDERAL REGISTER, unless another time limit is provided by the Secretary. Interested persons wanting to express their views in an informal hearing may do so, if within 15 days after the proposed Specification is published in the FEDERAL REGISTER, they request the Secretary to hold a hearing. Such informal hearings shall be held so as to give all interested persons an opportunity for the oral presentation of data, views, or arguments in addition to the opportunity to make written submissions. Notice of such hearings shall be published in the FEDERAL REGISTER. A transcript shall be kept of any oral presentations.

(b) Each Specification shall as a minimum include:

(1) A description of the performance characteristics of the consumer product covered;

(2) An identification by reference of the test methods to be used in measuring the performance characteristics. The test methods, where they exist and are deemed appropriate for inclusion in the particular Specification involved, shall be those which are described in nationally-recognized voluntary standards. Where appropriate test methods do not exist, they will be developed by the Department of Commerce in cooperation with interested parties and set out in full in the Specification;

(3) A prototype label and directions for displaying the label on or with the consumer product concerned. Such directions will not prohibit the display of additional information by the participant on space adjacent to the marked boundaries of the label; and

(4) Conditions of participation.

(c) The Secretary, after consideration of all written and oral comments and other materials received in accordance with paragraph (a) of this section, shall publish in the FEDERAL REGISTER within 30 days after the final date for receipt of comments, or as soon as practicable thereafter, a notice either:

(1) Giving the complete text of a final Specification, including conditions of use, and stating that any prospective participant in the program desiring voluntarily to use the Department of Commerce Mark developed under § 16.10 must advise the Department of Commerce: or

(2) Stating that the proposed Specification will be further developed before final publication; or

(3) Withdrawing the proposed Specification from further consideration.

§ 16.6 Establishment of fees and charges.

(a) The Secretary in conjunction with the use of the Working Capital Fund of the National Institute of Standards & Technology, as authorized under section 12 of the Act of March 3, 1901, as amended (15 U.S.C. 278b), for this program, shall establish fees and charges for use of the Department of Commerce Label and Mark on each product. Such fees and charges shall be related to the number of units of products labeled, where appropriate. The fees and charges established by the Secretary, which may be revised by her when she deems it appropriate to do so, shall be in amounts calculated to make the operation of this program as self-sufficient as reasonable. A separate notice will be published in the FEDERAL REGISTER simultaneously with the notice of each proposed Specification referred to in § 16.5(a). Such notice will set out a schedule of estimated fees and charges the Secretary proposes to establish. The notice would be furnished for informational and guidance purposes only in order that the public may evaluate the proposed Specification in light of the expected fees to be charged.

(b) At such time as the Secretary publishes the notice announcing the final Specification referred to in § 16.5(c)(1), she shall simultaneously publish a separate notice in the FEDERAL REGISTER setting forth the final schedule of fees that will be charged participants in the program. The effective date of such final schedule of fees shall be the same as the date on which the final Specification takes effect.

(c) Revisions, if any, to the fees and charges established by the Secretary under paragraph (b) of this section shall be published in subsequent FEDERAL REGISTER notices and shall take effect not less than thirty (30) days after the date of publication of such notice.

(d) The establishment of fees and charges under this section may, at any time, be suspended by the Secretary for any length of time.

[42 FR 26648, May 25, 1977, as amended at 42 FR 57686, Nov. 4, 1977, 55 FR 38315, Sept. 18, 1990]

§ 16.7 Participation in program.

(a) Any manufacturer, assembler, or private brand labeler of consumer products or importer of such products for resale, desiring to participate in this program will so notify the Secretary. The notification will identify the particular Specification to be used and the prospective participant's identification and model numbers for the products to be labeled. The notification must include a statement that if accepted as a participant in the program by the Secretary, the prospective participant will:

(1) Abide by all conditions imposed by these procedures:

(2) Abide by the conditions contained in the Specification, as prescribed in paragraph (d) of this section;

(3) Pay the fees and charges established by the Secretary; and

(4) Desist from using the Department of Commerce label and Mark if his participation is terminated under §16.8.

(b) The Secretary shall act expeditiously on all requests to participate in the program and shall notify each prospective participant of her decision in writing. In those instances where the Secretary declines a request, she shall state the reasons for so declining.

(c) If a prospective participant seeking to participate in the program is notified by the Secretary that she proposes to deny that prospective participant the right to participate, that prospective participant shall have thirty (30) days from the receipt of such notification to request a hearing under the provisions of 5 U.S.C. 556. The Secretary's proposed denial shall become final through the issuance of a written decision to such prospective participant in the event that he does not appeal such notification by the end of the thirty (30) day period. If however, such prospective participant requests a hearing within that thirty (30) day period, the Secretary's proposed denial shall be stayed pending the outcome of the hearing held pursuant to 5 U.S.C. 556.

(d) The conditions set out in each Specification will include, but not be limited to, the following:

(1) Prior to the use of a Label, the participant will make or have made the measurements to obtain the information required for inclusion on the Label and, if requested, will forward within 30 days such measurement data to the Secretary. Such measurement data will be kept on file by the participant or his agent for two years after that product is no longer manufactured unless otherwise provided in the Specification.

(2) The participant will describe the test results on the Label as prescribed in the Specification.

(3) The participant will display or arrange to display, in accordance with the appropriate Specification, the Label on or with each individual product of the type covered except for units exported from the U.S. Participants who utilized more than one brand name may participate by labeling some or all of the brand names. All models with the same brand name must be included in the program unless they are for export only.

(4) The participant agrees at his expense to comply with any reasonable request of the Secretary to have consumer products manufactured, assembled, imported, or privately brand labeled by him tested to determine that testing has been done according to the relevant Specification.

(5) Participants may reproduce the Department of Commerce Label and Mark in advertising: *Provided*, That the entire Label, complete with all information required to be displayed at the point of retail sale, is shown legibly and is not combined or associated directly with any other mark or logo.

§16.8 Termination of participation.

(a) The Secretary upon finding that a participant is not complying with the conditions set out in these procedures or in a Specification may terminate upon 30 days notice the participant's right to continue his participation in the program: *Provided*, That the participant shall first by given an opportunity to show cause why the participation should not be terminated.

(b) Upon receipt of a notice from the Secretary of the proposed termination, which notice shall set forth the reasons for such proposed termination, the participant shall have thirty (30) days from the date of receipt of such notification to request a hearing under the provisions of 5 U.S.C. 556. The Secretary's proposed termination shall become final through the issuance of a written decision to the participant in the event such participant does not appeal the proposed termination within the thirty (30) day period. If, however, the participant requests a hearing within the thirty (30) day period, the Secretary's proposed termination shall be stayed pending the outcome of the hearing held pursuant to 5 U.S.C. 556.

(c) A participant may at any time terminate his participation and responsibilities under this program with regard to a specific type of product by giving written notice to the Secretary

that he has discontinued use of the Department of Commerce Label and Mark for all consumer products of the type involved.

§ 16.9 Rules governing designated agents.

(a) The following rules, requirements and tasks shall be applicable with respect to the seeking of designated agent status and the performance of that role after such status has been obtained. Each person desiring to be designated as a designated agent under this program shall:

(1) Make written application to the Secretary;

(2) Provide appropriate information showing his qualifications to represent members within a given product area and that more than one prospective participant in that product area is agreeable to such representation; and

(3) Agree to service any participant in this program in the agent's cognizant product area whether or not such participant is a member of the organization or body which that agent represents.

(b) The Secretary may require a person seeking designated agent status to supply further information before granting such status to that person. The Secretary will notify each person seeking designated agent status, in writing, as expeditiously as possible after evaluating such person's application.

(c) Each person granted designated agent status shall:

(1) Provide the Secretary with a list of the participants that the designated agent services under the program. The Secretary shall also be provided an updated list as soon thereafter as may be practicable whenever there are any changes in the list;

(2) Collect fees and charges from the participants serviced under this program, consolidate such sums, and transmit those fees and charges required under § 16.6 to the Secreatry;

(3) Distribute Department of Commerce Marks developed under § 16.10 or instructions for the printing of such Marks to the participants that the designated agent services under this program;

(4) Gather and consolidate such statistical information as may be required by the Secretary from individual participants serviced;

(5) Provide the Secretary with reports, including the consolidate statistical information referred to in paragraph (c)(4) of this section, as may be called for by her, relative to the activities of the participants the designated agent is servicing; and

(6) Perform any additional tasks mutually agreed upon by the designated agent and the Secretary.

(d) If a person seeking designated agent status is notified by the Secretary that she proposes to deny that person such status, that person shall have thirty (30) days from the date of receipt of such notification to request a hearing under the provisions of 5 U.S.C. 556. The Secretary's proposed denial shall become final through the issuance of a written decision to such person in the event that he does not appeal such notification by the end of that thirty (30) day period. If, however, such person requests a hearing within that thirty (30) day period, the Secretary proposed denial shall be stayed pending the outcome of the hearing held pursuant to 5 U.S.C. 556.

(e) If the Secretary finds that a designated agent has violated the terms of paragraph (c) of this section, she may, after consultations with such designated agent, notify such person that she proposes to revoke his status as a designated agent.

(f) Upon receipt of a notice from the Secretary of the proposed revocation, which notice shall set forth the reasons for such proposed revocation, the designated agent shall have thirty (30) days from the date of receipt of such notification to request a hearing under the provisions of U.S.C. 556. The Secretary's proposed revocation shall become final through the issuance of a written decision to the designated agent in the event such designated agent does not appeal the proposed revocation within that thirty (30) day period. If, however, the designated agent requires a hearing within that thirty (30) day period, the Secretary's proposed revocation shall be stayed pending the outcome of the hearing held pursuant to 5 U.S.C. 556.

§ 16.10 The Department of Commerce Mark.

The Department of Commerce shall develop a Mark which shall be registered in the U.S. Patent and Trademark Office under 15 U.S.C. 1054 for use on each Label described in a Specification.

§ 16.11 Amendment or revision of a performance information labeling specification.

The Secretary may by order amend or revise any Specification published under § 16.5. The procedure applicable to the establishment of a Specification under § 16.5 shall be followed in amending or revising such Specification. Such amendment or revision shall not apply to consumer products manufactured prior to the effective date of the amendment or revision.

§ 16.12 Consumer education.

The Secretary, in close cooperation and coordination with interested Government agencies, appropriate trade associations and industry members, consumer organizations, and other interested persons shall carry out a program to educate consumers relative to the significance of the labeling program. Some elements of this program shall also be directed toward informing retailers and other interested groups about the program.

§ 16.13 Coordination with State and local programs.

The Secretary will establish and maintain an active program of communication with appropriate State and local government offices and agencies and will furnish and make available information and assistance that will promote uniformity in State and local programs for the labeling of performance characteristics of consumer products.

§ 16.14 Annual report.

The Secretary will prepare an annual report of activities under the program, including an evaluation of the program and a list of participants, designated agents, and types of consumer products covered.

PART 17—LICENSING OF GOVERNMENT-OWNED INVENTIONS IN THE CUSTODY OF THE DEPARTMENT OF COMMERCE

Subpart A—Licensing of Rights in Domestic Patents and Patent Applications

Sec.
17.1 Licensing rules.

Subpart B—Licensing of Rights in Foreign Patents and Patent Applications—[Reserved]

Subpart C—Appeal Procedures for Licensing Department of Commerce Patents

17.21 Purpose.
17.22 Definitions.
17.23 Authority to grant licenses.
17.24 Persons who may appeal.
17.25 Procedures.
17.26 Adjudicatory.

AUTHORITY: Sec. 205(c), 63 Stat. 390 (40 U.S.C. 486(c)).

EDITORIAL NOTE: 41 CFR Part 101–4 referred to in this part was removed at 50 FR 28402, July 12, 1985.

Subpart A—Licensing of Rights in Domestic Patents and Patent Applications

§ 17.1 Licensing rules.

(a) The Government-wide rules for the licensing of rights in domestic patents and patent applications vested in the United States of America, found at 41 CFR 101–4.1, are applicable to all such licensing activities of the Department of Commerce, subject to the following minor clarifications:

(1) The term ''Government agency'' as defined at 41 CFR 101–4.102(c) means the United States Department of Commerce or a designated operating unit within the Department.

(2) The term ''The head of the Government agency'', as defined at 41 CFR 101–4.102(d), means the Secretary of Commerce or a designee.

[42 FR 54415, Oct. 6, 1977]

Subpart B—Licensing of Rights in Foreign Patents and Patent Applications—[Reserved]

Subpart C—Appeal Procedures for Licensing Department of Commerce Patents

SOURCE: 49 FR 7986, Mar. 5, 1984, unless otherwise noted.

§ 17.21 Purpose.

This subpart describes the terms, conditions and procedures under which a party may appeal from a decision of the Director of the National Technical Information Service concerning the grant, denial, interpretation, modification or termination of a license of any patent in the custody of the Department of Commerce.

§ 17.22 Definitions.

(a) 41 CFR Part 101–4 shall mean the General Services Administration Final Rule concerning ''Patents: Licensing of Federally Owned Inventions'' which was originally published in the FEDERAL REGISTER, volume 47, number 152, Friday, August 6, 1982 at pages 34148 through 34151.

(b) Director shall mean the Director of the National Technical Information Service, and operating agency within the U.S. Department of Commerce.

(c) Under Secretary means the Under Secretary for Technology who is an officer appointed by the President and confirmed by the Senate and is an official to whom the Director reports within the Department of Commerce.

[49 FR 7986, Mar. 5, 1984, as amended at 55 FR 38983, Sept. 24, 1990]

§ 17.23 Authority to grant licenses.

The Director has been duly delegated authority to make any decision or determination concerning the granting, denial, interpretation, modification or termination of any license of any patent in the custody and control of the U.S. Department of Commerce. The decision and determination of the Director is final and conclusive on behalf of this Department unless the procedures for appeal set forth below are initiated.

§ 17.24 Persons who may appeal.

The following person(s) may appeal to the Under Secretary any decision or determination concerning the grant, denial, interpretation, modification or termination of a license:

(a) A person whose application for a license has been denied;

(b) A licensee whose license has been modified or terminated in whole or in part; or

(c) A person who has timely filed a written objection in response to the notice published in the FEDERAL REGISTER as required by 41 CFR 101–4.104–3(a)(1)(c)(i) or 101–4.104–3(b)(1)(i) and who can demonstrate to the satisfaction of the Under Secretary that such person may be damaged by the Director's determination.

[49 FR 7986, Mar. 5, 1984, as amended at 55 FR 38983, Sept. 24, 1990]

§ 17.25 Procedures.

(a) Any appellant party(ies) who was denied a license by the Director under § 17.24(a) shall not be entitled to an adversary hearing. Such party(ies) shall file appropriate documents no later than 30 days from the receipt of the Director's decision unless the Under Secretary grants for good cause an extension of time. The notice, in concise and brief terms, should state the grounds for appeal and include copies of all pertinent documents. Accompanying the notice should be concise arguments as to why the Director's decision should be rejected or modified.

(b) The Under Secretary shall render a written opinion within 30 days of receiving all required documentation in a non-adversary appeal.

(c) Judicial review is available as the law permits.

[49 FR 7986, Mar. 5, 1984, as amended at 55 FR 38983, Sept. 24, 1990]

§ 17.26 Adjudicatory.

(a) Any appellant party who seeks review of the Director's decision based upon a modification or termination of a license by the Director under § 17.24(b), or who has filed a timely objection and can demonstrate damages as provided in § 17.24(c), shall be entitled to an adversary hearing in accord

with the provisions of the Administrative Procedures Act (5 U.S.C. 554–557). A party may waive an adversary hearing by filing a written waiver with the Under Secretary.

(b) When an adversary hearing is required under §17.24 (b) or (c) the Under Secretary shall appoint as promptly as possible an Administrative Law Judge who shall hold hearings no later than 45 days from the date of the appointment. The hearings will be conducted in conformity with the objectives of the Administrative Procedure Act. The Administrative Law Judge shall submit a written recommendation to the Under Secretary no later than 30 days subsequent to the hearing and/or the filing of any required written arguments or documentation.

(c) The Under Secretary shall render a final written decision on behalf of the Department based upon the appeal file which shall include the hearing record, exhibits, written submissions of the party(ies), and the recommendation of the Administrative Law Judge. The Under Secretary's decision shall include the reasons which form the basis of the determination. The final decision may uphold, overrule, or modify the Director's decision or take any action deemed appropriate.

(d) Judicial review is available as the law permits.

[49 FR 7986, Mar. 5, 1984, as amended at 55 FR 38983, Sept. 24, 1990]

PART 18—ATTORNEY'S FEES AND OTHER EXPENSES

GENERAL PROVISIONS

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AUTHORITY: 5 U.S.C. 504(c)(1).

SOURCE: 47 FR 13510, Mar. 31, 1982, unless otherwise noted.

GENERAL PROVISIONS

§18.1 Purpose of these rules.

The Equal Access to Justice Act, 5 U.S.C. 504 (called ''the Act'' in this part), provides for the award of attorney fees and other expenses to eligible individuals and entities who are parties to certain administrative proceedings (called ''adversary adjudications'') before the Department of Commerce (the word Department includes its component agencies). An eligible party may receive an award when it prevails over the Department, unless the Department's position in the proceeding was substantially justified or special circumstances make an award unjust. The rules in this part describe the parties that are eligible for awards and the Department's proceedings that are covered by the Act. They also explain how to apply for awards, and the procedures and standards that the Department will use to make them.

§18.2 Definitions.

As used in this part:

(a) *Adversary adjudication* means an adjudication under 5 U.S.C. 554 in which the position of the United States is represented by counsel or otherwise, but excludes an adjudication for the purpose of establishing or fixing a rate or for the purpose of granting or renewing a license.

(b) *Adjudicative officer* means the official, without regard to whether the official is designated as an administrative law judge, a hearing officer or examiner, or otherwise, who presided at the adversary adjudication.

§ 18.3 When the Act applies.

The Act applies to any adversary adjudication pending or commenced before the Department on or after August 5, 1985. It also applies to any adversary adjudication commenced on or after October 1, 1984, and finally disposed of before August 5, 1985, provided that an application for fees and expenses, as described in §§ 18.11 through 18.14 of this part, has been filed with the Department within 30 days after August 5, 1985, and to any adversary adjudication pending on or commenced on or after October 1, 1981, in which an application for fees and other expenses was timely filed and was dismissed for lack of jurisdiction.

[53 FR 6798, Mar. 3, 1988]

§ 18.4 Proceedings covered.

(a) The Act applies to adversary adjudications conducted by the Department and to appeals of decisions of contracting officers of the Department made pursuant to section 6 of the Contract Disputes Act of 1978 (41 U.S.C. 605) before agency boards of contract appeals as provided in section 8 of that Act (41 U.S.C. 607). Adversary adjudications conducted by the Department are adjudications under 5 U.S.C. 554 in which the position of this or any other agency of the United States, or any component of an agency, is presented by an attorney or other representative who enters an appearance and participates in the proceeding. Pursuant to section 8(c) of the Contract Disputes Act (41 U.S.C. 607(c)), the Department has arranged for appeals from decisions by contracting officers of the Department to be decided by the General Services Administration Board of Contract Appeals. This Board, in accordance with its own procedures, shall be responsible for making determinations on applications pursuant to the Act relating to appeals to the Board from decisions of contracting officers of the Department. Such determinations are final, subject to appeal under § 18.23. Any proceeding in which the Department may prescribe a lawful present or future rate is not covered by the Act. Proceedings to grant or renew licenses are also excluded, but proceedings to modify, suspend, or revoke licenses are covered if they are otherwise ''adversary adjudications.'' The Department proceedings covered are:

(1) *Department-wide.* (i) Title VI Civil Rights hearings conducted by the Department under 42 U.S.C. 2000d–1 and 15 CFR 8.12(d).

(ii) Handicap discrimination hearings conducted by the Department under 29 U.S.C. 794(a) and 15 CFR 8.12(d).

(2) National Oceanic and Atmospheric Administration (''NOAA'')

(i) Proceedings concerning suspension, revocation, or modification of a permit or license issued by NOAA.

(ii) Proceedings to assess civil penalties under any of the statutes administered by NOAA.

(3) *International Trade Administration.* Enforcement proceedings under the AntiBoycott provisions of the Export Administration Act of 1979, 50 U.S.C. app. 2407.

(4) *Patent and Trademark Office.* Disbarment proceedings of attorneys and agents under 35 U.S.C. 32.

(b) The Department may also designate a proceeding not listed in paragraph (a) of this section as an adversary adjudication for purposes of the Act by so stating in an order initiating the proceeding or designating the matter for hearing. The Department's failure to designate a proceeding as an adversary adjudication shall not preclude the filing of an application by a party who believes the proceeding is covered by the Act; whether the proceeding is covered will then be an issue for resolution in proceedings on the application.

(c) If a proceeding includes both matters covered by the Act and matters specifically excluded from coverage, any award made will include only fees and expenses related to covered issues.

[47 FR 13510, Mar. 31, 1982, as amended at 53 FR 6798, Mar. 3, 1988]

§ 18.5 Eligibility of applicants.

(a) To be eligible for an award of attorney fees and other expenses under the Act, the applicant must be a party to the adversary adjudication for which it seeks an award. The term ''party'' is defined in 5 U.S.C. 551(3). The applicant must show that it meets all conditions of eligibility set out in this part.

(b) The types of eligible applicants are as follows:

(1) An individual with a net worth of not more than $2 million;

(2) The sole owner of an unincorporated business who has a net worth of not more than $7 million, including both personal and business interests, and not more than 500 employees;

(3) A charitable or other tax-exempt organization described in section 501(c)(3) of the Internal Revenue Code (26 U.S.C. 501(c)(3)) with not more than 500 employees;

(4) A cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)) with not more than 500 employees; and

(5) Any other partnership, corporation, association, unit of local government, or organization with a net worth of not more than $7 million and not more than 500 employees.

(c) For the purpose of eligibility, the net worth and number of employees of an applicant shall be determined as of the date the proceeding was initiated.

(d) An applicant who owns an unincorporated business will be considered as an ''individual'' rather than a ''sole owner of an unincorporated business'' if the issues on which the applicant prevails are related primarily to personal interests rather than to business interests.

(e) The employees of an applicant include all persons who regularly perform services for remuneration for the applicant, under the applicant's direction and control. Part-time employees shall be included on a proportional basis.

(f) The net worth and number of employees of the applicant and all of its affiliates shall be aggregated to determine eligibility. Any individual, corporation or other entity that directly or indirectly controls or owns a majority of the voting shares or other interest of the applicant, or any corporation or other entity of which the applicant directly or indirectly owns or controls a majority of the voting shares or other interest, will be considered an affiliate for purposes of this part, unless the adjudicative officer determines that such treatment would be unjust and contrary to the purposes of the Act in light of the actual relationship between the affiliated entities. In addition, the adjudicative officer may determine that financial relationships of the applicant other than those described in this paragraph constitute special circumstances that would make an award unjust.

(g) An applicant that participates in a proceeding primarily on behalf of one or more other persons or entities that would be ineligible is not itself eligible for an award.

[47 FR 13510, Mar. 31, 1982, as amended at 53 FR 6798, Mar. 3, 1988]

§ 18.6 Standards for awards.

(a) A prevailing applicant may receive an award for fees and expenses incurred in connection with a proceeding, or in a significant and discrete substantive portion of the proceedings, unless the position of the Department over which the applicant has prevailed was substantially justified. The position of the Department includes, in addition to the position taken by the Department in the adversary adjudication, the action or failure to act by the Department upon which the adversary adjudication is based. The burden of proof that an award should not be made to an eligible prevailing applicant because the Department's position was substantially justified is on the agency counsel.

(b) An award will be reduced or denied if the applicant has unduly or unreasonably protracted the proceeding or if special circumstances make the award sought unjust.

[47 FR 13510, Mar. 31, 1982, as amended at 53 FR 6799, Mar. 3, 1988]

§ 18.7 Allowable fees and expenses.

(a) Awards will be based on rates customarily charged by persons engaged in the business of acting as attorneys, agents and expert witnesses, even if the services were made available without charge or at a reduced rate to the applicant.

(b) No award for the fee of an attorney or agent under this rule may exceed $75.00 per hour. No award to compensate an expert witness may exceed the highest rate at which the Department pays expert witnesses. However, an award may also include the reasonable expenses of the attorney, agent, or

witness as a separate item, if the attorney, agent, or witness ordinarily charges clients separately for such expenses.

(c) In determining the reasonableness of the fee sought for an attorney, agent, or expert witness, the adjudicative officer shall consider the following:

(1) If the attorney, agent, or witness is in private practice, his or her customary fee for similar services, or, if an employee of the applicant, the fully allocated cost of the services;

(2) The prevailing rate for similar services in the community in which the attorney, agent or witness ordinarily performs services;

(3) The time actually spent in the representation of the applicant;

(4) The time reasonably spent in light of the difficulty or complexity of the issues in the proceedings; and

(5) Such other factors as may bear on the value of the services provided.

(d) The reasonable cost of any study, analysis, engineering report, test, project, or similar matter prepared on behalf of a party may be awarded, to the extent that the charge for the service does not exceed the prevailing rate for similar services, and the study or other matter was necessary for preparation of the applicant's case.

[47 FR 13510, Mar. 31, 1982, as amended at 53 FR 6799, Mar. 3, 1988]

§ 18.8 Rulemaking on maximum rates for attorney fees.

(a) If warranted by an increase in the cost of living or by special circumstances (such as limited availability of attorneys qualified to handle certain types of proceedings), the Department may adopt regulations providing that attorney fees may be awarded at a rate higher than the ceiling set forth in § 18.7(b) in some or all of the types of proceedings covered by this part. The Department will conduct any rulemaking proceedings for this purpose under the informal rulemaking procedures of the Administrative Procedure Act.

(b) Any person may file with the Department a petition for rulemaking to increase the maximum rate for attorney fees. The petition should be sent to the General Counsel, Department of Commerce, 14th Street and Constitution Avenue, Room 5870, Washington, D.C. 20230. The petition should identify the rate the petitioner believes the Department should establish and the types of proceedings in which the rate should be used. It should also explain fully the reasons why higher rate is warranted. The Department will respond to the petition within 60 days after it is filed, by initiating a rulemaking proceeding, denying the petition, or taking other appropriate action.

§ 18.9 Awards against other agencies.

If an applicant is entitled to an award because it prevailed over another agency of the United States that participated in a proceeding before the Department and took a position that was not substantially justified, the award or an appropriate portion of the award shall be made against that agency.

§ 18.10 Delegations of authority.

The Secretary delegates to the General Counsel the authority to take final action on matters pertaining to the Act.

INFORMATION REQUIRED FROM APPLICANTS

§ 18.11 Contents of application.

(a) An application for an award of fees and expenses under the Act shall identify the applicant and the proceeding for which an award is sought. The application shall show that the applicant has prevailed and identify the position of the Department or other agency in the proceeding that the applicant alleges was not substantially justified. Unless the applicant is an individual, the application shall also state the number of employees of the applicant and describe briefly the type and purpose of its organization or business.

(b) The application shall also include a statement that the applicant's net worth does not exceed $2 million (if an individual) or $7 million (for all other applicants, including their affiliates). However, an applicant may omit this statement if:

(1) It attaches a copy of a ruling by the Internal Revenue Service that it

qualifies as an organization described in section 501(c)(3) of the Internal Revenue Code (26 U.S.C. 501(c)(3)), or, in the case of a tax-exempt organization not required to obtain a ruling from the Internal Revenue Service on its exempt status, a statement that describes the basis for the applicant's belief that it qualifies under such section; or

(2) It states that it is a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)) and includes a copy of its charter or articles of incorporation.

(c) The application shall state the amount of fees and expenses for which an award is sought.

(d) The application may also include any other matters that the applicant wishes the adjudicative officer to consider in determining whether and in what amount an award should be made.

(e) The application shall be signed by the applicant or an authorized officer or attorney of the applicant. It shall also contain or be accompanied by a written verification under oath or under penalty of perjury that the information provided in the application is true and correct.

[47 FR 13510, Mar. 31, 1982, as amended at 53 FR 6799, Mar. 3, 1988]

§18.12 Net worth exhibit.

(a) Each applicant except a qualified tax-exempt organization or cooperative association must provide with its application a detailed exhibit showing the net worth of the applicant and any affiliates (as defined in §18.5(f) of this part) when the proceeding was initiated. Unless regulations issued by a component of the Department establish particular requirements, the exhibit may be in any form convenient to the applicant that provides full disclosure of the applicant's and its affiliates' assets and liabilities and is sufficient to determine whether the applicant qualifies under the standards in this part. The adjudicative officer may require an applicant to file additional information to determine its eligibility for an award.

(b) Ordinarily, the net worth exhibit will be included in the public record of the proceeding. However, an applicant that objects to public disclosure of information in any portion of the exhibit and believes there are legal grounds for withholding it from disclosure may submit that portion of the exhibit directly to the adjudicative officer in a sealed envelope labeled ''Confidential Financial Information,'' accompanied by a motion to withhold the information from public disclosure. The motion shall describe the information sought to be withheld and explain, in detail, why it falls within one or more of the specific exemptions from mandatory disclosure under the Freedom of Information Act, 5 U.S.C. 552(b)(1)–(9), why public disclosure of the information would adeversely affect the applicant, and why disclosure is not required in the public interest. The material in question shall be served on counsel representing the agency against which the applicant seeks an award, but need not be served on any other party to the proceeding. If the adjudicative officer finds that the information should not be withheld from disclosure, it shall be placed in the public record of the proceeding. Otherwise, any request to inspect or copy the exhibit shall be disposed of in accordance with the Department's established procedures under the Freedom of Information Act (15 CFR Part 4).

[47 FR 13510, Mar. 31, 1982, as amended at 53 FR 6799, Mar. 3, 1988]

§18.13 Documentation of fees and expenses.

The application shall be accompanied by full documentation of the fees and expenses, including the cost of any study, analysis, engineering report, test, project, or similar matter for which an award is sought. A separate itemized statement shall be submitted for each professional firm or individual whose services are covered by the application, showing the hours spent in connection with the proceeding by each individual, a description of the specific services performed, the rate at which each fee has been computed, any expenses for which reimbursement is sought, the total amount claimed, and the total amount paid or payable by the applicant or by any other person or entity for the services provided. The adjudicative officer may require the applicant to provide vouchers, receipts,

or other substantiation for any expenses claimed.

§ 18.14 When an application may be filed.

(a) An application may be filed whenever the applicant has prevailed in the proceeding or in a significant and discrete substantive portion of the proceeding, but in no case later than 30 days after the Department's final disposition of the proceeding.

(b) For purposes of this rule, final disposition means the date on which a decision or order disposing of the merits of the proceeding or any other complete resolution of the proceeding, such as a settlement or voluntary dismissal, becomes final and unappealable, both within the agency and to the courts.

(c) If review or reconsideration is sought or taken of a decision as to which an applicant believes it has prevailed, proceedings for the award of fees shall be stayed pending final disposition of the underlying controversy. When the United States appeals the underlying merits of an adversary adjudication to a court, no decision on an application for fees and other expenses in connection with that adversary adjudication shall be made until a final and unreviewable decision is rendered by the court on the appeal or until the underlying merits of the case have been finally determined pursuant to the appeal.

[47 FR 13510, Mar. 31, 1982, as amended at 53 FR 6799, Mar. 3, 1988]

PROCEDURES FOR CONSIDERING APPLICATIONS

§ 18.15 Filing and service of documents.

Any application for an award or other pleading or document related to an application shall be filed and served on all parties to the proceeding in the same manner as other pleadings in the proceeding, except as provided in §18.12(b) for confidential financial information.

§ 18.16 Answer to application.

(a) Within 30 calendar days after service of an application, counsel representing the agency against which an award is sought may file an answer to the application. Unless agency counsel requests an extension of time for filing (an extension for an additional 30 days is available as a matter of right) or files a statement of intent to negotiate under paragraph (b) of this section, failure to file an answer within the 30 calendar day period may be treated as a consent to the award requested.

(b) If agency counsel and the applicant believe that the issues in the fee application can be settled, they may jointly file a statement of their intent to negotiate a settlement. The filing of this statement shall extend the time for filing an answer for an additional 30 days, and further extensions may be granted by the adjudicative officer upon request by agency counsel and the applicant.

(c) The answer shall explain in detail any objections to the award requested and identify the facts relied on in support of the agency counsel's position. If the answer is based on any alleged facts not already in the record of the proceeding, agency counsel shall include with the answer either supporting affidavits or a request for further proceedings under § 18.20.

[47 FR 13510, Mar. 31, 1982, as amended at 53 FR 6799, Mar. 3, 1988]

§ 18.17 Reply.

Within 15 calendar days after service of an answer, the applicant may file a reply. If the reply is based on any alleged facts not already in the record of the proceeding, the applicant shall include with the reply either supporting affidavits or a request for further proceedings under § 18.20.

§ 18.18 Comments by other parties.

Any party to a proceeding other than the applicant and the agency counsel may file comments on an application within 30 calendar days after it is served or on an answer within 15 calendar days after it is served. A commenting party may not participate further in proceedings on the application unless the adjudicative officer determines that the public interest requires such participation in order to permit

full exploration of matters raised in the comments.

[47 FR 13510, Mar. 31, 1982, as amended at 53 FR 6799, Mar. 3, 1988]

§18.19 Settlement.

The applicant and agency counsel may agree on a proposed settlement of the award before final action on the application, either in connection with a settlement of the underlying proceeding, or after the underlying proceeding has been concluded, in accordance with the component agency's standard settlement procedure. If a prevailing party and agency counsel agree on a proposed settlement of an award before an application has been filed, the application shall be filed with the proposed settlement.

[47 FR 13510, Mar. 31, 1982, as amended at 53 FR 6799, Mar. 3, 1988]

§18.20 Further proceedings.

(a) Ordinarily, the determination of an award will be made on the basis of the written record. However, on request of either the applicant or agency counsel, or on his or her own initiative, the adjudicative officer may order further proceedings, such as an informal conference, oral argument, additional written submissions or, as to issues other than substantial justification (such as the applicant's eligibility or substantiation of fees and expenses), pertinent discovery or an evidentiary hearing. Such further proceedings shall be held only when necessary for full and fair resolution of the issues arising from the application, and shall be conducted as promptly as possible. Whether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought.

(b) A request that the adjudicative officer order further proceedings under this section shall specifically identify the information sought or the disputed issues and shall explain why the additional proceedings are necessary to resolve the issues.

[47 FR 13510, Mar. 31, 1982, as amended at 53 FR 6799, Mar. 3, 1988]

§18.21 Decision.

The adjudicative officer shall issue an initial decision on the application within 30 calendar days after completion of proceedings on the application. The initial decision of the adjudicative officer shall include written findings and conclusions on the applicant's eligibility and status as a prevailing party, and an explanation of the reasons for any difference between the amount requested and the amount awarded. The decision shall also include, if at issue, findings on whether the Department's position was substantially justified, whether the applicant unduly protracted the proceedings, or whether special circumstances make an award unjust. If the applicant has sought an award against more than one agency, the decision shall allocate responsibility for payment of any award made among the agencies, and shall explain the reasons for the allocation made.

[47 FR 13510, Mar. 31, 1982, as amended at 53 FR 6799, Mar. 3, 1988]

§18.22 Agency review.

Either the applicant or agency counsel may file a petition for review of the initial decision on the fee application, or the Department may decide to review the decision on its own initiative. The petition must be filed with the General Counsel, Office of the Assistant General Counsel for Administration, Rm. 5882, U.S. Department of Commerce, 14th Street and Pennsylvania Avenue NW., Washington, DC 20230, not later than 30 calendar days after the initial decision is issued. For purposes of this section, a document will be considered filed with the General Counsel as of the date of the postmark (or for government penalty mail, as shown by a certificate of mailing), if mailed, or if not mailed, as of the date actually delivered to the Office of General Counsel. A petition for review must be accompanied by a full written statement in support thereof, including a precise statement of why the petitioner believes the initial decision should be reversed or modified, and proof of service upon all parties. A response to the petition may be filed by another party to the proceeding and

must be filed with the General Counsel at the above address not more than 30 calendar days after the date of service of the petition for review. The General Counsel may request any further submissions deemed helpful in resolving the petition for review. If neither the applicant nor agency counsel seeks review and the Department does not take review on its own initiative, the initial decision on the application shall become a final decision of the Department 30 calendar days after it is issued. Whether to review a decision is a matter within the discretion of the General Counsel. If review is taken, the General Counsel will issue the Department's final decision on the application or remand the application to the adjudicative officer for further proceedings. The standard of review exercised by the General Counsel shall be that which was required for the highest level of Departmental review which could have been exercised on the underlying covered proceeding.

[53 FR 6799, Mar. 3, 1988]

§ 18.23 Judicial review.

Judicial review of final agency decisions on awards may be sought as provided in 5 U.S.C. 504(c)(2).

§ 18.24 Payment of award.

An applicant seeking payment of an award by the Department shall submit a copy of the final decision granting the award, accompanied by a certification that the applicant will not seek review of the decision in the United States courts to the General Counsel, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Room 5870, Washington, D.C. 20230. The Department will pay the amount awarded to the applicant within 60 calendar days, unless judicial review of the award or of the underlying decision of the adversary adjudication has been sought by the applicant or any other party to the proceeding.

[47 FR 13510, Mar. 31, 1982, as amended at 53 FR 6800, Mar. 3, 1988]

PART 19—REFERRAL OF DEBTS TO THE IRS FOR TAX REFUND OFFSET

Sec.

19.1 Purpose.
19.2 Applicability and scope.
19.3 Administrative charges.
19.4 Notice requirement before offset.
19.5 Review within the Department.
19.6 Departmental determination.
19.7 Stay of offset.

AUTHORITY: 31 U.S.C. 3720A; Public Law 98–369; 98 Stat. 1153.

SOURCE: 58 FR 39653, July 26. 1993, unless otherwise noted.

§ 19.1 Purpose.

This part establishes procedures for the Department of Commerce (DOC) to refer past-due debts to the Internal Revenue Service (IRS) for offset against the income tax refunds of persons owing debts to the DOC. It specifies the agency procedures and the rights of the debtor applicable to claims for payment of debts owed to the DOC.

§ 19.2 Applicability and scope.

(a) These regulations implement 31 U.S.C. 3720A which authorizes the IRS to reduce a tax refund by the amount of a past-due legally enforceable debt owed to the United States.

(b) For purposes of this section, a past-due legally enforceable debt referable to the IRS is a debt which is owed to the United States and:

(1) Except in the case of a judgment debt, has been delinquent for at least three months but has not been delinquent for more than ten years at the time the offset is made;

(2) Cannot be currently collected pursuant to the salary offset provisions of 5 U.S.C. 5514(a)(1);

(3) Is ineligible for administrative offset under 31 U.S.C. 3716(a) by reason of 31 U.S.C. 3716(c)(2) or cannot be collected by administrative offset under 31 U.S.C. 3716(a) by the Department against amounts payable to or on behalf of the debtor by or on behalf of the Department;

(4) With respect to which, the DOC has given the taxpayer at least 60 days from the date of notification to present evidence that all or part of the debt is not past-due or legally enforceable, the DOC has considered evidence presented by such taxpayer, and has determined that an amount of such debt is past-due and legally enforceable;

(5) Has been disclosed by the DOC to a consumer reporting agency as authorized by 31 U.S.C. 3711(f), unless a consumer reporting agency would be prohibited from using such information by 15 U.S.C. 1681c, or unless the amount of the debt does not exceed $100.00;

(6) With respect to which, the DOC has notified or has made a reasonable attempt to notify the taxpayer that the debt is past-due and, unless repaid within 60 days thereafter, will be referred to the IRS for offset against any overpayment of taxes;

(7) Is at least $25.00;

(8) With respect to which, all other requirements of 31 U.S.C. 3720A and the Department of the Treasury regulations codified at 26 CFR 301.6402–6 relating to the eligibility of a debt for tax refund offset have been satisfied.

§19.3 Administrative charges.

In accordance with 4 CFR part 102, all administrative charges incurred in connection with the referral of a debt to the IRS shall be assessed on the debt and thus increase the amount of the offset.

§19.4 Notice requirement before offset.

A request for a reduction of an IRS tax refund will be made only after the DOC makes a determination that an amount is owed and past-due and provides the debtor with sixty (60) days written notice. The DOC's notice of intention to collect by IRS tax refund offset (Notice of Intent) will include:

(a) The amount of the debt;

(b) A statement that unless the debt is repaid within sixty (60) days from the date of the DOC's Notice of Intent, DOC intends to collect the debt by requesting that the IRS reduce any amounts payable to the debtor as refunds of Federal taxes paid by an amount equal to the amount of the debt plus accumulated interest and other charges;

(c) A statement that the debtor has the right to present evidence that all or part of the debt is not pass-due or legally enforceable;

(d) A mailing address for forwarding any written correspondence and a contact name and phone number for any questions.

§19.5 Review within the Department.

(a) *Notification by debtor.* A debtor who receives a Notice of Intent has the right to present evidence that all or part of the debt is not past-due or not legally enforceable. To exercise this right, the debtor must:

(1) Send a written request for a review of the evidence to the address provided in the notice.

(2) State in the request the amount disputed and the reasons why the debtor believes that the debt is not past-due or legally enforceable.

(3) Include in the request any documents which the debtor wishes to be considered or state that additional information will be submitted within the remainder of the sixty (60) day period.

(b) *Submission of evidence.* The debtor may submit evidence showing that all or part of the debt is not past-due or not legally enforceable along with the notification required by paragraph (a) of this section. Failure to submit the notification and evidence within sixty (60) days will result in an automatic referral of the debt to the IRS without further action by the DOC.

(c) *Review of the evidence.* DOC will consider all available evidence related to the debt. Within 30 days of the debtor's complete and timely response, if feasible, DOC will notify the debtor whether DOC has sustained, amended, or canceled its determination that the debt is past-due and legally enforceable.

§19.6 Departmental determination.

(a) Following review of the evidence, DOC will issue a written decision which will include the supporting rationale for the decision.

(b) If DOC either sustains or amends its determination, it shall notify the debtor of its intent to refer the debt to the IRS for offset against the debtor's Federal income tax refund. If DOC cancels its original determination, the debt will not be referred to the IRS.

§19.7 Stay of offset.

If the debtor timely notifies the DOC that he or she is exercising the right described in §19.5(a) and timely submits evidence in accordance with §19.5(b), any notice to the IRS will be stayed until the issuance of a written

decision which sustains or amends the DOC's original determination.

PART 20—NONDISCRIMINATION ON THE BASIS OF AGE IN PROGRAMS OR ACTIVITIES RECEIVING FEDERAL FINANCIAL ASSISTANCE

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20.17 Remedial action by recipients.
20.18 Alternative funds disbursal procedure.
20.19 Private lawsuits after exhaustion of administrative remedies.

AUTHORITY: Age Discrimination Act of 1975, as amended, 42 U.S.C. sec. 6101 *et seq.* and the government-wide regulations implementing the Act, 45 CFR Part 90.

SOURCE: 51 FR 28926, Aug. 13, 1986, unless otherwise noted.

Subpart A—General

§ 20.1 The purpose of DOC's age discrimination regulations.

The purpose of these regulations is to set out DOC's policies and procedures under the Age Discrimination Act of 1975 and the general age discrimination regulations at 45 CFR Part 90. The Act and the general regulations prohibit discrimination on the basis of age in programs or activities receiving Federal financial assistance. The Act and the general regulations permit federally assisted programs and activities, and recipients of Federal funds, to continue to use age distinctions and factors other than age which meet the requirements of the Act and its implementing regulations.

§ 20.2 Programs to which these regulations apply.

(a) The Act and these regulations apply to each DOC recipient and to each program or activity operated by the recipient which receives or benefits from Federal financial assistance provided by any entity of DOC.

(b) The Act and these regulations do not apply to:

(1) An age distinction contained in that part of a Federal, State, or local statute or ordinance adopted by an elected, general purpose legislative body which:

(i) Provides benefits or assistance to persons based on age; or

(ii) Establishes criteria for participation in age-related terms; or

(iii) Describes intended beneficiaries or target groups in age-related terms.

(2) Any employment practice or any employer, employment agency, labor organization, or any labor-management joint apprenticeship training program, except for any program or activity receiving Federal financial assistance for public service employment.

§ 20.3 Definitions.

As used in these regulations, the following terms are defined as follows:

(a) *Act* means the Age Discrimination Act of 1975, as amended (Title III of Pub. L. 94–135).

(b) *Action* means any act, activity, policy, rule, standard, or method of administration; or the use of any policy, rule, standard, or method of administration.

(c) *Age* means how old a person is, or the number of years from the date of a person's birth.

(d) *Age distinction* means any action using age or an age-related term.

(e) *Age-related term* means a word or words which necessarily imply a particular age or range of ages (for example: ''children,'' ''adult,'' ''older persons,'' but not ''student'').

(f) *Agency* means a Federal department or agency that is empowered to extend financial assistance.

(g) *DOC* means the U.S. Department of Commerce.

(h) *Federal financial assistance* means any grant, entitlement, loan, cooperative agreement, contract (other than a procurement contract or a contract of insurance or guaranty), or any other arrangement by which the agency provides or otherwise makes available assistance in the form of:

(1) Funds; or

(2) Services of Federal personnel; or

(3) Real and personal property or any interest in or use of property, including:

(i) Transfers or leases of property for less than fair market value or for reduced considerations; and

(ii) Proceeds from a subsequent transfer or lease of property if the Federal share of its fair market value is not returned to the Federal Government.

(i) *Normal operation* means the operation of a program or activity without significant changes that would impair its ability to meet its objectives.

(j) *Recipient* means any State or its political subdivision, any instrumentality of a State or its political sub-division, any public or private agency, institution, organization, or other entity, or any person to which Federal financial assistance is extended, directly or through another recipient. Recipient includes any successor, assignee, or transferee, but excludes the ultimate beneficiary of the assistance.

(k) *Secretary* means the Secretary of Commerce or his or her designee.

(l) *Statutory objective* means any purpose of a program or activity expressly stated in any Federal statute, State statute, or local statute or ordinance adopted by an elected, general purpose legislative body.

(m) *Subrecipient* means any of the entities in the definition of ''recipient'' to which a recipient extends or passes on Federal financial assistance. A subrecipient is generally regarded as a recipient of Federal financial assistance and has all the duties of a recipient in these regulations.

(n) *United States* means the fifty States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, the Northern Marianas, and the territories and possessions of the United States.

Subpart B—Standards for Determining Age Discrimination

§20.4 Rules against age discrimination.

The rules stated in this section are limited by the exceptions contained in §20.5.

(a) General rule: No person in the United States shall, on the basis of age, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

(b) Specific rules: A recipient may not, in any program or activity receiving Federal financial assistance, directly or through contractual licensing, or other arrangements, use age distinctions or take any other actions which have the effect, on the basis of age, of:

(1) Excluding individuals from, denying them the benefits of, or subjecting them to discrimination under, a program or activity receiving Federal financial assistance, or

(2) Denying or limiting individuals in their opportunity to participate in any program or activity receiving Federal financial assistance.

(c) The specific forms of age discrimination listed in paragaph (b) of this section do not necessarily constitute a complete list.

(d) If a recipient operating a program provides special benefits to the elderly or to children, such use of age distinctions shall be presumed to be necessary to the normal operation of the program, notwithstanding the provisions of §20.5.

§20.5 Exceptions to the rules.

(a) *Normal operations or statutory objective of any program or activity*. A recipient is permitted to take an action

otherwise prohibited by § 20.4 if the action reasonably considers age as a factor necessary to the normal operation or the achievement of any statutory objective of a program or activity. An action meets this standard if:

(1) Age is used as a measure or approximation of one or more other characteristics; and

(2) The other characteristic(s) must be measured or approximated in order for the normal operation of the program or activity to continue, or to achieve any statutory objective or the program or activity; and

(3) The other characteristic(s) can be reasonably measured or approximated by the use of age; and

(4) The other characteristic(s) are impractical to measure directly on an individual bases.

(b) *Reasonable factors other than age.* A recipient is permitted to take an action otherwise prohibited by § 20.4 which is based on a factor other than age, even though that action may have a disproportionate effect on persons of different ages. An action may be based on a factor other than age only if the factor bears a direct and substantial relationship to the normal operation of the program or activity or to the achievement of a statutory objective.

§ 20.6 Burden of proof.

The burden of proving that an age distinction or other action falls within the exceptions outlined in § 20.5 is on the recipient of Federal financial assistance.

Subpart C—Responsibilities of DOC Recipients

§ 20.7 General responsibilities.

Each DOC recipient has primary responsibility to ensure that its programs and activities are in compliance with the Act, the general regulations, and these regulations, and shall take steps to eliminate violation of the Act.

(a) Each DOC recipient will provide an assurance that the program for which it is receiving Federal financial assistance will be conducted in compliance with all requirements for the Act and these and other DOC regulations. A recipient also has responsibility to maintain records, provide information, and to afford DOC reasonable access to its records and facilities to the extent necessary to determine whether it is in compliance with the Act and these regulations.

(b) *Recipient assessment of age distinctions.* (1) To assess the recipient's compliance with the Act, DOC may, as part of a compliance review under § 20.10 or a complaint investigation under § 20.11, require a recipient employing the equivalent or 15 or more employees, to complete, in a manner specified by the responsible Department official, a written self-evaluation of any age distinction imposed in its program or activity receiving Federal financial assistance from DOC.

(2) Whenever an assessment indicates a violation of the Act and the DOC regulations, the recipient shall take corrective action.

§ 20.8 Notice to subrecipients.

Where a recipient passes on Federal financial assistant from DOC to subrecipients, the recipient shall give subrecipients written notice of their obligations under the Act and these regulations.

§ 20.9 Information requirements.

Upon DOC's request, each recipient shall provide access and make information available for DOC to determine whether the recipient is complying with the Act and these regulations.

Subpart D—Investigation, Conciliation, and Enforcement Procedures

§ 20.10 Compliance reviews.

(a) DOC may conduct compliance reviews and pre-award reviews or use other similar procedures that will permit it to investigate and correct violations of the Act and these regulations. DOC may conduct such review even in the absence of a complaint against a recipient. The review may be as comprehensive as necessary to determine whether a violation of the Act and these regulations has occurred.

(b) If a compliance review of pre-award review indicates a violation of the Act or these regulations, DOC will

attempt to achieve voluntary compliance with the Act. If voluntary compliance cannot be achieved, DOC will arrange for enforcement as described in §20.15.

§20.11 Complaints.

(a) Any person, individually, or as a member of a class, or on behalf of others, may file a complaint with DOC alleging discrimination prohibited by the Act or these regulations based on an action occurring on or after July 1, 1979. A complainant shall file a complaint within 180 days from the date the complainant first had knowledge of the alleged act of discrimination. However, for good cause shown, DOC may extend this time limit.

(b) DOC will attempt to facilitate the filing of complaints wherever possible, including taking the following measures:

(1) Accepting as a sufficient complaint, any written statement which: identifies the parties involved and the date the complainant first had knowledge of the alleged violation; describes generally the action or practice complained of; and is signed by the complainant;

(2) Freely permitting a complainant to add information to the complaint to meet the requirements of a sufficient complaint;

(3) Considering as the filing date, the date on which a complaint is sufficient to be processed;

(4) Notifiying the complainant and the recipient of their rights and obligations under the compliant procedure, including the right to have a representative at all stages of the process;

(5) Notifying the complainant and the recipient (or their representatives) of their right to contact DOC for information and assistance regarding the complaint resolution process.

(c) DOC will return to the complainant any complaint outside the jurisdiction of these regulations, and will state the reason(s) why it is outside the jurisdiction of these regulations.

§20.12 Mediation.

(a) DOC will refer to a mediation service designated by the Secretary all sufficient complaints that:

(1) Fall within the jurisdiction of the Act and these regulations, unless the age distinction complained of is clearly within an exception; and

(2) Contain all information necessary for further processing.

(b) Both the complainant and the recipient shall participate in the mediation process to the extent necessary to reach an agreement or to make an informed judgment that an agreement is not possible.

(c) If the complainant and the recipient reach an agreement, the mediator shall prepare a written statement of the agreement and have the complainant and the recipient sign it. The mediator shall send a copy of the agreement to DOC. DOC will take no further action on the complaint unless the complainant or the recipient fails to comply with the agreement.

(d) The mediator is required to protect the confidentiality of all information obtained in the course of the mediation process. No mediator shall testify in any adjudicative proceeding, produce any document, or otherwise disclose any information obtained, in the course of the mediation process without prior approval of the head or the mediation service.

(e) The mediation will proceed for a maximum of 60 days after a complaint is filed with DOC. Mediation ends if:

(1) 60 days elapse from the time DOC receives the complaint; *or*

(2) Prior to the end of that 60-day period, an agreement is reached; *or*

(3) Prior to the end of that 60-day period, the mediator determines that an agreement cannot be reached.

(f) The mediator shall return unresolved complaints to DOC.

§20.13 Investigation.

(a) Informal investigation:

(1) DOC will investigate complaints that are unresolved after mediation or are reopended because of a violation of a mediation agreement.

(2) As part of the initial investigation, DOC will use informal factfinding methods, including joint or separate discussions with the complainant and recipient, to establish the facts and, if possible, settle the complaint on terms

that are mutually agreeable to the parties. DOC may seek the assistance of any involved State program agency.

(3) DOC will put any agreement in writing and have it signed by the parties and an authorized offical at DOC.

(4) The settlement shall not affect the operation of any other enforcement effort of DOC, including compliance reviews and investigation or other complaints which may involve the recipient.

(5) The settlement is not a finding of discrimination against a recipient.

(b) Formal investigation: If DOC cannot resolve the complaint through informal investigation, it will begin to develop formal findings through further investigation of the complaint. If the investigation indicates a violation of these regulations, DOC will attempt to obtain voluntary compliance. If DOC cannot obtain voluntary compliance, it will begin enforcement as described in § 8a.15.

§ 20.14 Prohibition against intimidation or retaliation.

A recipient may not engage in acts of intimidation or retaliation against any person who:

(a) Attempts to assert a right protected by the Act or these regulations; or

(b) Cooperates in any mediation, investigation, hearing, or other part of DOC's investigation, conciliation, and enforcement process.

§ 20.15 Compliance procedure.

(a) DOC may enforce the Act and these regulations by:

(1) Terminating the Federal financial assistance to the recipient under the program or activity found to have violated the Act or these regulations. The determination of the recipient's violation may be made only after a recipient has had an opportunity for a hearing on the record before an administrative law judge. If a case is settled during mediation, or prior to hearing, Federal financial assistance to the program will not be terminated.

(2) Any other means authorized by law including but not limited to:

(i) Referral to the Department of Justice for proceedings to enforce any rights of the United States or obligations of the recipient created by the Act or these regulations.

(ii) Use of any requirement of or referral to any Federal, State, or local government agency that will have the effect of correcting a violation of the Act or these regulations.

(b) DOC will limit any termination under this section to the particular recipient and particular program or activity or part of such program and activity DOC finds in violation of these regulations. DOC will not base any part of a termination on a finding with respect to any program or activity of the recipient which does not receive Federal financial assistance from DOC.

(c) DOC will take no action under paragraph (a) until:

(1) The head of the organization providing the financial assistance has advised the recipient of its failure to comply with the Act and these regulations and has determined that voluntary compliance cannot be obtained.

(2) Thirty days have elapsed after the Secretary has sent a written report of the circumstances and grounds of the action to the committees of the Congress having legislative jurisdiction over the Federal program or activity involved. The Secretary will file a report whenever any action is taken under paragraph (a).

(d) DOC also may defer granting new Federal financial assistance to a recipient when a hearing under § 20.16 is initiated.

(1) New Federal financial assistance from DOC includes all assistance for which DOC requires an application or approval, including renewal or continuation of existing activities, or authorization of new activities, during the deferral period. New Federal financial assistance from DOC does not include increases in funding as a result of changed computation of formula awards or assistance approved prior to the beginning of a hearing under § 20.16.

(2) DOC will not begin a deferral until the recipient has received a notice of an opportunity for a hearing under § 20.16. DOC will not continue a deferral for more than 60 days unless a hearing has begun within that time, or the time for beginning the hearing has been extended by mutual consent of

the recipient and the head of the organization providing Federal financial assistance. DOC will not continue a deferral for more than 30 days after the close of the hearing, unless the hearing results in a finding against the recipient.

(3) DOC will limit any deferral to the particular recipient and particular program or activity or part of such program or activity DOC finds in violation of these regulations. DOC will not base any part of a deferral on a finding with respect to any program or activity of the recipient which does not, and would not in connection with the new funds, receive Federal financial assistance for DOC.

§ 20.16 Hearings, decisions, post-termination proceedings.

Certain DOC procedural provisions applicable to Title VI of the Civil Rights Act of 1964 apply to DOC enforcement of these regulations. They are found in 15 CFR Part 8, § 8.12 and § 8.13.

§ 20.17 Remedial action by recipients.

(a) Where DOC finds that a recipient has discriminated on the basis of age, the recipient shall take any remedial action that DOC may require to overcome the effects of the discrimination. If another recipient exercises control over the recipient that has discriminated, DOC may require both recipients to take remedial action.

(b) Even in the absence of a finding of discrimination, a recipient may take affirmative action to overcome the effects of conditions that resulted in limited participation in the recipient's program or activity on the basis of age.

§ 20.18 Alternative funds disbursal procedure.

(a) When, under the provisions of these regulations, DOC terminates the funding of a recipient, the Secretary may, using undisbursed funds from the terminated award, make a new award to an alternate recipient, *i.e.* any public or non-profit private organization or agency, or State or political subdivision of the State.

(b) The Secretary will require any alternate recipient to demonstrate:

(1) The ability to comply with these regulations; and

(2) The ability to achieve the goals of the Federal statute authorizing the program or activity.

§ 20.19 Private lawsuits after exhaustion of administrative remedies.

(a) A complainant may file a civil action following the exhaustion of administrative remedies under the Act. Administrative remedies are exhausted if:

(1) 180 days have elapsed since the complainant filed the complaint and DOC has made no finding with regard to the complaint; or

(2) DOC issues any finding in favor of the recipient.

(b) If DOC fails to make a finding within 180 days or issues a finding in favor of recipient, DOC shall:

(1) Promptly advise the complainant of this fact; and

(2) Advise the complainant of his or her right to bring civil action for injunctive relief; and

(3) Inform the complainant that:

(i) The complainant may bring a civil action only in a United States district court for the district in which the recipient is located or transacts business;

(ii) A complainant prevailing in a civil action has the right to be awarded the costs of the action, including reasonable attorney's fees, but that the complainant must demand these costs in the complaint;

(iii) Before commencing the action, the complainant shall give 30 days notice by registered mail to the Secretary, the Attorney General of the United States, and the recipient;

(iv) The notice shall contain the alleged violation of the Act, the relief requested, the court in which the complainant is bringing the action, and whether or not attorney's fees are demanded in the event the complainant prevails; and

(v) The complainant may not bring an action if the same alleged violation of the Act by the same recipient is the subject of a pending action in any court of the United States.

PART 21—ADMINISTRATIVE OFFSET

Sec.

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AUTHORITY: 31 U.S.C. 3716; 4 CFR Part 102.

SOURCE: 51 FR 47005, Dec. 30, 1986, unless otherwise noted.

§ 21.1 Definitions.

For purposes of this subpart:

(a) The term *administrative offset* means satisfying a debt by withholding of money payable by the Department to, or held by the Department on behalf of a person, to satisfy a debt owed the Federal Government by that person.

(b) The term *person* includes individuals, businesses, organizations and other entities, but does not include any agency of the United States, or any State or local government.

(c) The terms *claim* and *debt* are deemed synonymous and interchangeable. They refer to an amount of money or property which has been determined by an appropriate agency official to be owed to the United States from any person, organization, or entity, except another Federal agency, a State or local government, or Indian Tribal Government.

(d) Agency means:

(1) An Executive department, military department, Government corporation, or independent establishment as defined in 5 U.S.C. 101, 102, 103, or 104, respectively.

(2) The United States Postal Service; or

(3) The Postal Rate Commission.

(e) Debtor means the same as ''person.''

(f) *Department* means the Department of Commerce.

(g) *Secretary* means the Secretary of the Department of Commerce.

(h) *Assistant Secretary for Administration* means the Assistant Secretary for Administration of the Department of Commerce.

(i) *United States* includes an ''agency'' of the United States.

(j) *Waiver* means the cancellation, remission, forgiveness, or non-recovery of a debt allegedly owed by a person to the United States.

(k) *Departmental Unit* means an individual operating or administrative component within the Department of Commerce.

(l) *Departmental Unit Head* means the head of an individual operating or administrative component within the Department of Commerce responsible for debt collection.

(m) *Notice of Intent* means a demand notice sent by the Department to the debtor indicating not only the amount due, but also the Department's intent to offset all or some of the amount due from other source(s) of Federal payment(s) that may be due the debtor.

(n) *Workout Group* means Departmental debt collection specialist(s) assigned to collection of a delinquent debt when the claim is 30 or more days past due.

§ 21.2 Purpose and scope.

(a) The regulations in this subpart establish procedures to implement section 10 of the Debt Collection Act of 1982 (Pub. L. 97–365), 31 U.S.C. 3716. Among other things, this statute authorizes the heads of each agency to collect a claim arising under an agency program by means of administrative offset, except that no claim may be collected by such means if outstanding for more than 10 years after the agency's right to collect the debt first accrued, unless facts material to the Government's right to collect the debt were not known and could not reasonably have been known by the official or officials of the Government who were

charged with the responsibility to discover and collect such debts.

(b) Unless otherwise provided for by statute, these regulations do not apply to an agency of the United States, a State government, or unit of general local government. In addition, these procedures do not apply to debts arising under the Internal Revenue Code (26 U.S.C. 1–9602), the Social Security Act (42 U.S.C. 301–1397f), the tariff laws of the United States; or to contracts covered by the Contract Dispute Act of 1978 (41 U.S.C. 601–613).

(c) The regulations cover debts owed to the United States from any person, organization or entity, including debts owed by current and former Department employee, or other Federal employees, while employed in one capacity or another by the Department of Commerce.

(d) Debts or payments which are not subject to administrative offset under 31 U.S.C. 3716, unless otherwise provided for by contract or law, may be collected by administrative offset under the common law or other applicable statutory authority.

(e) Departmental unit head (and designees) will use administrative offset to collect delinquent claims which are certain in amount in every instance and which collection is determined to be feasible and not prohibited by law.

§ 21.3 Department responsibilities.

(a) Each Departmental unit which has delinquent debts owed under its program is responsible for collecting its claims by means of administrative offset when appropriate and best suited to further and protect all the Government's interests.

(b) The Departmental unit head (or designee) will determine the feasibility and cost effectiveness of collection by administrative offset on a case-by-case basis, exercising sound discretion in pursuing such offsets, and will consider the following:

(1) The debtor's financial condition;

(2) Whether offset would substantially interfere with or defeat the purposes of the Federal program authorizing the payments against which offset is comtemplated; and

(3) Whether offset best serves to further and protect all of the interests of the United States.

(c) Before advising the debtor that the delinquent debt will be subject to administrative offset, the Departmental unit workout group shall review the claim and determine that the debt is valid and overdue. In the case where a debt arises under the programs of two or more Department of Commerce units, or in such other instances as the Assistant Secretary for Administration or his/her designee may deem appropriate, the Assistant Secretary, or his or her designee, may determine which Departmental unit workout group or official(s) shall have responsibility for carrying out the provisions of this subpart.

(d) Administrative offset shall be considered by Department units only after attempting to collect a claim under section 3(a) of the Federal Claims Collection Act of 1966, as amended; except that no claim under this Act that has been outstanding for more than 10 years after the debt first accrued may be collected by means of administrative offset, unless facts, material to the right to collect the debt, were not known and could not reasonably have been known by the official of the Department who was charged with the responsibility to discover and collect such debts. When the debt first accrued should be determined according to existing laws regarding the accrual of debts, such as under 28 U.S.C. 2415.

§ 21.4 Notification requirements before offset.

A debt is considered delinquent by the Department if it is not paid within 15 days of the due date, or if there is no due date, within 30 days of the billing date.

(a) The Departmental unit head (and designees) responsible for carrying out the provisions of this subpart with respect to the debt shall ensure that appropriate written demands are sent to the debtor in terms which inform the debtor of the consequences of failure to cooperate in payment of the debt. The first demand letter should be sent within ten (10) days after the date the debt becomes delinquent. A total of three progressively stronger written

demand letters, at not more than 30 calendar day intervals, will normally be made unless (1) a response to the first or second demand indicates that a further demand would be futile; (2) the debtor's response does not require any or immediate rebuttal; and/or (3) the bureau determines to pursue offset under the procedures specified in 4 CFR 102.3, Collection by Administrative Offset. In determining the timing of the demand letters, Departmental unit heads should give due regard to the need to act promptly; so as a general rule, if it is necessary to refer the debt to the Department of Justice for action, such referral can be made within one year of the final determination of the facts and the amount of the debt. When Departmental unit heads (and designees) deem it appropriate to protect the Government's interests (for example, to prevent the statute of limitations, 28 U.S.C. 2415, from expiring), written demand for payment may be preceded by other appropriate collection actions (also see § 21.10(c)).

(b) The Department official responsible for collection of the debt (generally an accounting or finance officer) shall ensure that an initial written demand notice is sent to the debtor, informing such debtor of:

(1) The amount and basis for the indebtedness and whatever rights the debtor may have to seek review within the Department;

(2) The applicable standards for assessing interest, penalties, and administrative costs (4 CFR 102.13);

(3) That the debtor has a right to inspect and copy Department records related to the debt, as determined by responsible Departmental official(s), and that such request to inspect and copy must be postmarked or received by the Department no later than 30 days after the date of the (first) demand letter;

(4) The name, mailing address, and telephone number of the Department workout group employee who can provide a full explanation of the claim and answer all related questions, as well as explain procedures to the debtor for inspecting and copying records related to the debt.

(c) The responsible Department officials shall exercise due care to insure that demand letters are mailed or hand delivered on the same day that they are actually dated. If evidence suggests that the debtor is no longer located at the address of record, reasonable action shall be taken by the Departmental unit workout group to obtain a current address, including skip-trace assistance from the Internal Revenue Service and/or private sector credit reporting bureaus.

(d) Where applicable, the Departmental unit workout group must inform the debtor in a second demand letter, (Notice of Intent) of:

(1) The nature and amount of the debt;

(2) That the Department intends to collect the debt by administrative offset until the debt and all accumulated interest and other charges are paid in full;

(3) That the debtor has a right to obtain review within the Department of the initial determination of indebtedness, and that such request to have a review of the basis of indebtedness must be postmarked or received by the Department no later than 30 days after the date of the second demand letter (Notice of Intent); and

(4) That the debtor may enter into a written agreement with the responsible Department official(s) to repay the debt if such a request is made and received by the Department no later than 30 days after the date of the second demand letter (Notice of Intent).

If the sum of the proposed offset does not fully cover the amount of the debt owed, the Departmental unit workout group shall also include in this second demand letter (Notice of Intent) the notice provisions to debtors required by the Debt Collection Act of 1982, and other regulations of the Department, pertaining to disclosure of the delinquent debt to credit reporting agencies, referral to private collection agencies, salary offset, possible Internal Revenue Service offset of tax refunds, and referral of the debt to the Justice Department for action to the extent inclusion of such is appropriate and practical.

(5) That if payment or a request for review is not received within the 30-day period, the offset process will be initiated.

§21.5 Exceptions to notification requirements.

(a) In cases where the notice specified in §21.4 has previously been provided to the debtor in connection with the same debt under some other proceeding, such as a final audit resolution determination, the Department is not required to duplicate those requirements before effecting administrative offset.

(b) If the time before payment is to be made to the debtor does not reasonably permit the completion of the procedures specified in §21.4, and failure to take offset would substantially prejudice the Government's ability to collect the debt, then administrative offset action will be taken without notification. The offset will be promptly followed by the completion of the procedures specified in §21.4 (also see §21.10(c)).

§21.6 Written agreement to repay debt.

(a) A debtor will be provided with an opportunity to enter into a written agreement with the responsible Departmental official(s) to repay the debt owed if the following conditions are met and if specific conditions exist that limit his or her ability to immediately repay the debt.

(1) Notification by debtor. The debtor may, in response to the first written demand or Notice of Intent, propose a written agreement for delayed lump sum or installment payments to repay the debt as an alternative to administrative offset. Any debtor who wishes to do this must submit a proposed written agreement signed by the debtor to repay the debt, including interest, penalties, and administrative costs determined by the Department as due. This proposed written agreement must be received by the workout group individual specified in §21.4(b)(4) within 60 calendar days of the date of the Department's initial written demand letter, or if in response to the Notice of Intent, within 30 calendar days of the date of the Department's Notice of Intent.

(2) Department response. In response to timely notification by the debtor as described in paragraph (a)(1) of this section, the Departmental unit head (or designee) will notify the debtor within 30 calendar days whether the debtor's proposed written agreement for repayment is acceptable. It is within the discretion of the Departmental unit head (or designee) to accept a repayment agreement instead of proceeding by offset. However, if the debt is delinquent and the debtor has not disputed its existence or amount, the Departmental unit head (or designee) should accept a repayment agreement instead of offset only if the debtor is able to establish that offset would result in undue financial hardship or would be against equity and good conscience. Before accepting a repayment agreement, the Departmental unit head (or designee) will also consider factors such as the financial statements provided by the debtor, the amount of the debt, the length of the proposed repayment period (generally not to exceed 3 years), whether the debtor is willing to sign a confess-judgment note or give collateral, and past dealings with the debtor. In making this determination, the Departmental unit head (or designee) will balance the Department's interest in collecting the debt against the financial hardship to the debtor (see §21.18). A Departmental unit head (or designee) may deem a repayment plan to be abrogated if the debtor should, after the repayment plan is signed, fail to comply with the terms of the plan.

§21.7 Review of Department records related to the debt.

(a) *Notification by debtor.* A debtor who intends to inspect or copy Department records related to the debt must send a letter to the Departmental unit workout group employee specified in §21.4(b)(4) stating his or her intentions. The letter must be postmarked or received by the Department within 30 calendar days of the date of the Department's *first* demand letter.

(b) *Department response.* In response to timely notification by the debtor as described in paragraph (a) of this section, the Departmental unit workout group will notify the debtor within 10 days of the request of the location and time when the debtor may inspect or copy agency records related to the debt, as well as provide the debtor with

the name and telephone number of the contact person who may provide assistance to the debtor for ensuring that copies are made of all appropriate documents related to the debt. The debtor may also request that such records be copied and mailed. The responsible Department official(s) will provide access to records within 15 days from the date of the debtor's request for access, or mail the records to the debtor within such time period. Mailing of records by Departmental official(s) will be by certified or registered mail. The debtor will have 25 days from the date of access or 30 days from the date the records were mailed, to review the records and pay the debt or to petition the Department of a review of the determination of indebtedness.

§ 21.8 Review within the Department of a determination of indebtedness.

(a) Notification by debtor. A debtor who receives an initial demand for payment under the procedures, or a Notice of Intent (see § 21.4(d)), has the right to request Department review of the determination of indebtedness. To exercises this right, the debtor must send a letter requesting review to the Departmental unit workout group individual identified in § 21.4(b)(4). The letter must explain why the debtor seeks review and must be postmarked within 60 calendar days of the date of the first demand letter, (or 30 days from the Notice of Intent), or if a request has been made by the debtor to copy or have relevant records mailed, within the calendar-day time period provided in § 21.7(b), above.

(b) *Department response.* In response to a timely request for review of the initial determination of indebtedness, the Departmental unit head (or designee) will notify the debtor whether review will be by (1) oral hearing, or (2) by administrative review of the record. The notice to the debtor will include the procedures (see § 21.11) used by Departmental officials for administrative review of the record, or will include information on the date, location and procedures to be used if review is by an oral hearing.

§ 21.9 Types of reviews.

The Department will provide the debtor with an opportunity for an oral hearing, or an administrative review of the documentation relating to the debt, under the following conditions.

(a) *Oral hearing.* The Departmental unit head (or designee) will provide the debtor with a reasonable opportunity for hearing if:

(1) An applicable statute authorizes or requires the Department to consider waiver of the indebtedness, the debtor requests waiver of the indebtedness involved, and the waiver determination turns on credibility or veracity; or

(2) The debtor requests reconsideration of the debt and the Departmental unit head (or designee) determines that the question of the indebtedness cannot be resolved by review of the documentary evidence.

An oral hearing need not be a formal (evidentiary type) hearing. However, hearing officials should carefully document all significant matters discussed at the hearing.

(b) *Administrative review of written record.* Unless the Departmental unit head (or designee) determines that an oral hearing is required (see paragraph (a) of this section), the unit head (or designee) will provide for a review of the written record(s) (a review of the documentary evidence related to the debt, in the form of a ''paper hearing'').

§ 21.10 Review procedures.

(a) The oral hearing will be conducted as follows:

(1) The hearing official will take necessary steps to ensure that the hearing is conducted in a fair and expeditious manner. If necessary, the hearing officer may administer oaths of affirmation.

(2) The hearing official need not use the formal rules of evidence with regard to admissibility of evidence or the use of evidence once admitted. However, parties may object to clearly irrelevant material.

(3) The hearing official will record all significant matters discussed at the hearing. There will be no ''official'' record or transcript provided for these hearings.

(4) A debtor may represent himself or herself or may be represented by an attorney or other person. The Department will be represented by the General Counsel or his designee.

(5) The General Counsel (or designee) will proceed first by presenting evidence on the relevant issues. The debtor then presents his or her evidence regarding these issues. The General Counsel then may offer evidence to rebut or clarify the evidence introduced by the debtor.

(b) *Administrative review of the record:* The Departmental unit head (or designee) will designate an official of the Department as hearing official who will review administrative determinations of indebtedness which are not reviewable under criteria provided in §21.9(a) for justifying an oral hearing. The hearing official will review all material related to the debt which is in the possession of the Department. The hearing official will make a determination based upon a review of this written record, which may include a request for reconsideration of the determination of indebtedness, or such other relevant material submitted by the debtor.

(c) The Department may effect an administrative offset against a payment to be made to a debtor prior to the completion of any of the due process procedures required by this section, if failure to take the offset would substantially prejudice the Department's ability to collect the debt. For example, if the time before the payment is to be made to the debtor by another Federal department or agency would not reasonably permit the completion of due process procedures, the offset may be accomplished by the Department. Such offset prior to completion of due process review hearing will be promptly followed by the completion of review and decision by the hearing official on the validity of the debt. Amounts recovered by offset in these instances, but later found not owed to the agency, will be promptly refunded.

§21.11 Determination of indebtedness.

(a) Following the hearing or the review of the record, the hearing official will issue a written decision which includes the supporting rationale for the decision. The decision of the hearing official is the Department unit's final action with regard to the particular administrative offset.

(b) Copies of the hearing official's decision will be distributed to the General Counsel (or designee) for the Department, the Director of the Department's Office of Finance and Federal Assistance, the appropriate Departmental unit accounting/finance officer, the debtor and the debtor's attorney or other representative, if applicable.

(c) If appropriate, this decision shall inform the debtor of the scheduled date on or after which administrative offset will begin. The decision shall also, if appropriate, indicate any changes in the information to the extent such information differs from that provided in the initial notification under §21.4.

§21.12 Coordinating administrative offset within the Department and with other Federal agencies.

Departmental units will cooperate with other Federal departments and agencies in effecting collection by administrative offset. Whenever possible, Departmental units should comply with requests from within the Department and from other Federal agencies to initiate administrative offset procedures to collect debts owed the United States, unless the requesting office or agency has not complied with the Federal Claims Collections Standards, or the agency's implementing regulations, or the request would otherwise be contrary to law or the best interests of the United States.

(a) *When the Department is owed the debt.* When the Department is owed a debt, but another Federal agency is responsible for making the payment to the debtor against which administrative offset is sought, the other agency will not initiate the requested administrative offset until the Department provides responsible officials at that agency with a written certification that the debtor owes the Department a debt (including the amount and basis for the debt and the due date of the payment) and that the Department has complied with the applicable provisions of Part 102, ''Standards for the Administrative Collection of Claims,'' of the Federal Claims Collection

Standards, as well as the Department's implementing regulations on administrative offsets.

(b) When another agency is owed the debt. The Department may administratively offset money it owes to a person who is indebted to another agency if requested to do so by that agency. Such a request must be accompanied by a certification by the requesting agency that the person owes the debt (including the amount and basis for the debt) and that the creditor agency has complied with the applicable Federal Claims Collection Standards, as well as the agency implementing regulations on administrative offsets. The request from another Federal agency for Department cooperation in the offset should be sent to:

Director, Office of Finance and Federal Assistance, Room 6827, Herbert C. Hoover Building, Washington, D.C. 20230

§ 21.13 Procedures for administrative offset: single debts.

(a) Administrative offset will commence 31 days after the date of the Notice of Intent, unless the debtor has requested a hearing (see § 21.8) or has entered into a repayment agreement (see § 21.6).

(b) When there is review of the debt within the Department, administrative offset will begin after the hearing officer's determination has been issued under § 21.11 and a copy of the determination is received by the Departmental unit's accounting or finance office, except for the provision provided in § 21.10(c) when immediate action is determined necessary to ensure the Department's position in collection of the delinquent debt.

§ 21.14 Procedures for administrative offset: multiple debts.

The Departmental units will follow the procedures identified in (§ 21.13) for the administrative offset of a single debt. However, when collecting multiple debts by administrative offset, responsible Departmental officials should apply the recovered amounts to those debts in accordance with the best interests of the United States, as determined by the facts and circumstances of the particular case, paying special attention to applicable statutes of limitations.

§ 21.15 Administrative offset against amounts payable from Civil Service Retirement and Disability Fund.

(a) Unless otherwise prohibited by law, the Department may request that monies which are due and payable to a debtor from the Civil Service Retirement and Disability Fund be administratively offset in reasonable amounts in order to collect debts owed to the United States by the debtor. Such requests shall be made by the Departmental unit workout officials to the appropriate officials of the Office of Personnel Management (OPM) in accordance with their regulations and procedures.

(b) When making a request for administrative offset under paragraph (a) of the section, the responsible workout group debt collection official shall include a written certification that:

(1) The debtor owes the United States a debt, including the amount and basis for the debt;

(2) The Department has complied with all applicable statutes, regulations, and procedures of the Office of Personnel Management; and

(3) The Department has complied with the requirements of the applicable provisions of the Federal Claims Collection Standards and these regulations, including any required hearing or review.

(c) If a Departmental unit workout group decides to request administrative offset under paragraph (a) of this section, the responsible debt collection official should make the request as soon as practical after completion of the applicable due process procedures so the Office of Personnel Management may identify and ''flag'' the debtor's account in anticipation of the time when the debtor becomes eligible and requests to receive payments from the fund. This will satisfy any requirement that offset be initiated prior to expiration of the applicable statute of limitations. At such time as the debtor makes a claim for payments from the fund, and if at least a year has elapsed since the administrative offset request was originally made, the debtor should

be permitted to offer a satisfactory repayment plan in lieu of offset upon establishing to the appropriate Departmental unit head (or designee) that changed financial circumstances would render the offset unjust.

(d) If the Department collects part or all of the debt by other means before deductions are made or completed under paragraph (a) of this section, the Department official responsible for collecting the debt will act promptly to modify or terminate the agency's request for administrative offset under paragraph (a) of this section.

(e) In accordance with procedures established by the Office of Personnel Management, the Department may request an offset from the Civil Service Retirement and Disability Fund prior to completion of due process procedures.

§21.16 Collection against a judgment.

Collection by administrative offset against a judgment obtained by a debtor against the United States shall be accomplished in accordance with 31 U.S.C. 3728.

§21.17 Liquidation of collateral.

If the Department holds security or collateral which may be liquidated through the exercise of a power of sale in the security instrument, or a nonjudicial foreclosure, liquidation should be accomplished by such procedures if the debtor fails to pay the debt within a reasonable time after demand or pursuant to the contract of the parties, unless the cost of disposing of the collateral would be disproportionate to its value or special circumstances require judicial foreclosure. The Department collection official should provide the debtor with reasonable notice of the sale, an accounting of any surplus proceeds, and any other procedures required by contract or law. Collection from other sources, including liquidation of security or collateral, is not a prerequisite to requiring payment by a surety or insurance concern unless such action is expressly required by statute or contract.

§21.18 Collection in installments.

(a) Whenever feasible, and unless otherwise provided by law, debts owed to the United States, together with interest, penalties, and administrative costs should be collected in one lump sum. This is true whether the debt is being collected by administrative offset or by another method, including voluntary payment. However, if the debtor is financially unable to pay the indebtedness in one lump sum, the responsible Departmental official(s) may accept repayment in regular installments (See §21.6). Prior to approving such repayments, financial statements shall be required from the debtor who represents that he/she is unable to pay the debt in one lump sum. A responsible Departmental official who agrees to accept payment in regular installments should obtain a legally enforceable written agreement from the debtor which specifies all of the terms of the arrangement and which contains a provision accelerating the debt in the event the debtor defaults. The size and frequency of installment payments should bear a reasonable relationship to the size of the debt and the debtor's ability to pay. If possible, the installment payments should be sufficient in size and frequency to liquidate the Government's claim in not more than three years. Installment payments of less than $50 per month should be accepted only if justifiable on the grounds of financial hardship or for some other reasonable cause. If the debt is an unsecured claim for administrative collection, attempts should be made to obtain an executed confess-judgment note, comparable to the Department of Justice Form USA–70a, from a debtor when the total amount of the deferred installments will exceed $750. Such notes may be sought when an unsecured obligation of a lesser amount is involved. When attempting to obtain confess-judgment notes, Departmental units should provide their debtors with written explanation of the consequences of signing the note, and should maintain documentation sufficient to demonstrate that the debtor has signed the note knowingly and voluntarily. Security for deferred payments other than a confess-judgment note may be accepted in appropriate cases. A Departmental units head (or designee) may accept installment payments notwithstanding the refusal of a

debtor to execute a confess-judgment note or to give other security.

(b) If the debtor owes more than one debt and designates how a voluntary installment payment is to be applied as among those debts, that designation must be followed. If the debtor does not designate the application of the payment, the Department debt collection official should apply payments to the various debts in accordance with the best interests of the United States, as determined by the facts and circumstances of the particular case, paying special attention to applicable statutes of limitations.

§ 21.19 Additional administrative collection action.

Nothing contained in this subpart is intended to preclude the utilization of any other administrative remedy which may be available.

PART 22—SALARY OFFSET

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AUTHORITY: 5 U.S.C. 5514; 5 CFR 550.1104.

SOURCE: 52 FR 7, Jan. 2, 1987, unless otherwise noted.

§ 22.1 Scope.

(a) These regulations provide Department procedures for collection by salary offset of a Federal employee's pay to satisfy certain debts owed the Government.

(b) These regulations apply to collections by the Secretary from:

(1) Federal employees who owe debts to the Department; and

(2) Current employees of the Department who owe debts to other agencies.

(c) These regulations do not apply to debts or claims arising under the Internal Revenue Code of 1954, as amended (26 U.S.C. 1 *et seq.)*; the Social Security Act (42 U.S.C. 301 *et seq.)*; the tariff laws of the United States; or to any case where collection of a debt by salary offset is explicitly provided for or prohibited by another statute (e.g., travel advances in 5 U.S.C. 5705 and employee training expenses in 5 U.S.C. 4108).

(d) These regulations do not apply to any adjustment to pay arising out of an employee's election of coverage or a change in coverage under a Federal benefits program requiring periodic deductions from pay, if the amount to be recovered was accumulated over four pay periods or less.

(e) Nothing in these regulations precludes the compromise, suspension, or termination of collection actions where appropriate.

§ 22.2 Definitions.

(a) *Agency* means:

(1) An Executive department, military department, Government corporation, or independent establishment as defined in 5 U.S.C. 101, 102, 103, and 104, respectively;

(2) The United States Postal Service;

(3) The Postal Rate Commission;

(4) An agency or court of the judicial branch; and

(5) An agency of the legislative branch, including the U.S. Senate and the U.S. House of Representatives.

(b) *Creditor agency* means the agency to which the debt is owed.

(c) *Days* means calendar days.

(d) *Debt* means:

(1) An amount of money owed the United States from sources which include loans insured or guaranteed by the United States; from fees, leases, rents, royalties, services, sales of real or personal property, overpayments,

penalties, damages, fines and forfeitures (except those arising under the Uniform Code of Military Justice);

(2) An amount owed to the United States by an employee for pecuniary losses, including, but not limited to:

(i) Theft, misuse, or loss of Government funds;

(ii) False claims for services and travel;

(iii) Illegal or unauthorized obligations and expenditures of Government appropriations;

(iv) Authorization of the use of Government owned or leased equipment, facilities, supplies, and services for other than official or approved purposes;

(v) Vehicle accidents where the employee is determined to be liable for the repair or replacement of a Government owned or leased vehicle; and

(vi) Erroneous entries on accounting records or reports for actions for which the employee can be held liable.

(e) *Department* or *DOC* means the United States Department of Commerce.

(f) *Disposable pay* means the amount that remains from an employee's Federal pay after required deductions for Federal, State and local income taxes; Social Security taxes, including Medicare taxes; Federal retirement programs; premiums for basic life and health insurance benefits; and such other deductions that are required by law to be withheld.

(g) *Employee* means:

(1) A civilian employee as defined in 5 U.S.C. 2105;

(2) A member of the Armed Forces or Reserves of the United States, or of a uniformed service, including a commissioned officer of the National Oceanic and Atmospheric Administration;

(3) An employee of the United States Postal Service or the Postal Rate Commission;

(4) An employee of an agency or court of the judicial branch; and

(5) An employee of the legislative branch, including the U.S. Senate and the U.S. House of Representatives.

(h) *FCCS* means the Federal Claims Collection Standards jointly published by the Department of Justice and the General Accounting Office at 4 CFR 101.1 *et seq.*

(i) *Offset* means a deduction from the disposable pay of an employee to satisfy a debt with or without the employee's consent.

(j) *Pay* means basic pay, special pay, incentive pay, retired pay, retainer pay, or, in the case of an employee not entitled to basic pay, other authorized pay.

(k) *Paying agency* means the agency employing the individual and authorizing his or her current pay.

(l) *Payroll office* means the Departmental or other office providing payroll services to the employee.

(m) *Secretary* means the Secretary of Commerce, or his/her designee.

§22.3 Pay subject to offset.

(a) An offset from an employee's pay may not exceed 15 percent of the employee's disposable pay, unless the employee agrees in writing to a larger offset amount.

(b) An offset from pay shall be made at the officially established pay intervals from the employee's current pay account.

(c) If an employee retires, resigns, or is discharged, or if his or her employment period or period of active duty otherwise ends, an offset may be made from subsequent payment on any amount due to the individual from the Federal Government.

§22.4 Determination of indebtedness.

In determining that an employee is indebted, the Secretary will review the debt to make sure that it is valid and past due.

§22.5 Notice requirements before offset.

Except as provided in §22.1, deductions will not be made unless the Secretary provides the employee with a minimum of 30 calendar days written notice. This Notice of Intent to offset an employee's salary (Notice of Intent) will state:

(a) That the Secretary has reviewed the records relating to the claim and has determined that a debt is owed, the amount of the debt, and the facts giving rise to the debt;

(b) The Secretary's intention to collect the debt by means of deduction from the employee's current disposable

pay account until the debt and all accumulated interest are paid in full;

(c) The amount, frequency, approximate beginning date, and duration of the intended deductions;

(d) An explanation of the Department's requirements concerning interest, penalties and administrative costs unless such payments are excused in accordance with § 22.15;

(e) The employee's right to inspect and to request and receive a copy of Department records relating to the debt;

(f) The right to a hearing conducted by an administrative law judge of the Department or a hearing official, not under the control of the Secretary, on the Secretary's determination of the debt, the amount of the debt, or the repayment schedule (i.e., the percentage of disposable pay to be deducted each pay period), so long as a petition is filed by the employee as prescribed by the Secretary;

(g) The method and time period for requesting a hearing;

(h) That the timely filing of a petition for hearing will stay the collection proceedings; (See § 22.6);

(i) That a final decision on the hearing will be issued at the earliest practical date, but not later than 60 days after the filing of the petition requesting the hearing, unless the employee requests and the hearing official grants a delay in the proceedings;

(j) Any other rights and remedies available to the employee under statutes or regulations governing the program for which the collection is being made; and

(k) That any knowingly false or frivolous statements, representations, or evidence may subject the employee to:

(1) Disciplinary procedures appropriate under 5 U.S.C. 7501 *et seq.*, 5 CFR Part 752, or any other applicable statutes or regulations;

(2) Penalties under the False Claims Act, 31 U.S.C. 3729–3731, or any other applicable statutory authority; or

(3) Criminal penalties under 18 U.S.C. 286, 287, 1001, and 1002 or any other applicable statutory authority.

(l) Unless there are applicable contractual or statutory provisions to the contrary, amounts paid on or deducted for the debt which are later waived or found not owed to the United States will be promptly refunded to the employee.

§ 22.6 Request for hearing-prehearing submission(s).

(a) An employee must file a petition for a hearing in accordance with the instructions in the Notice of Intent. This petition must be filed by the time stated in the notice described in § 22.5 if an employee wants a hearing concerning:

(1) The existence or amount of the debt; or

(2) The Secretary's proposed offset schedule.

(b) If the employee files his or her required submissions within 5 days after the deadline date established under § 22.5 and the hearing official finds that the employee has shown good cause for failure to comply with the deadline date, the hearing official may find that an employee has not waived his or her right to a hearing.

§ 22.7 Hearing procedures.

(a) The hearing will be presided over by either:

(1) A Department administrative law judge; or

(2) A hearing official not under the control of the Secretary.

(b) The hearing shall conform to § 102.3(c) of the Federal Claims Collection Standards (4 CFR 102.3(c)).

(c)(1) If the Secretary's determination regarding the existence or amount of the debt is contested, the burden is on the employee to demonstrate that the Secretary's determination was erroneous.

(2) If the hearing official finds the Secretary's determination of the amount of the debt was erroneous, the hearing official shall indicate the amount owed by the employee, if any.

(d)(1) If the Secretary's offset schedule is contested, the burden is on the employee to demonstrate that the payments called for under the Secretary's schedule will produce an extreme financial hardship for the employee under § 22.9.

(2) If the hearing official finds that the payments called for under the Secretary's offset schedule will produce an

extreme financial hardship for the employee, the hearing official shall establish an offset schedule that will result in the repayment of the debt in the shortest period of time without producing an extreme financial hardship for the employee.

§22.8 Written decision following a hearing.

(a) The hearing official shall issue to the Secretary and the employee a written opinion stating his or her decision, with a rationale supporting that decision, as soon as practicable after the hearing, but not later than 60 days after the employee files the petition requesting the hearing as provided in §22.5(i).

(b) The written decision following a hearing will include:

(1) A statement of the facts presented to support the nature and origin of the alleged debt;

(2) The hearing official's analysis, findings, and conclusions, in light of the hearing, concerning the employee's or the Department's grounds;

(3) The amount and validity of the alleged debt; and

(4) The repayment schedule if applicable.

(c) In determining whether the Secretary's determination of the existence or amount of the employee's debt was erroneous, the hearing official is governed by the relevant Federal statutes and regulations authorizing and implementing the programs giving rise to the debt, and by State law, if relevant.

§22.9 Standards for determining extreme financial hardship.

(a)(1) An offset produces an extreme financial hardship for an employee if the offset prevents the employee from meeting the costs necessarily incurred for essential subsistence expenses of the employee and his or her spouse and dependents.

(2) Ordinarily, essential subsistence expenses include only costs incurred for food, housing, clothing, transportation, and medical care.

(b) In determining whether an offset would prevent the employee from meeting the essential subsistence expenses described in paragraph (a) of this section, the hearing official shall require that the employee submit a detailed financial statement showing assets, liabilities, income and expenses.

§22.10 Review of Departmental records related to the debt.

(a) *Notification by employee.* An employee who intends to inspect or copy Departmental records related to the debt must make arrangements in conformance with the instructions in the Notice of Intent.

(b) *Secretary's response.* In response to a timely request submitted by the debtor, as described in paragraph (a) of this section, the Secretary will notify the employee of the location and time when the employee may inspect and copy Departmental records related to the debt.

§22.11 Coordinating offset with another Federal agency.

(a) *When Commerce is owed the debt.* When the Department is owed a debt by an employee of another agency, the Department will submit a written request to the paying agency to begin salary offset. This request will include certification as to the debt (including the amount and basis of the debt and the due date of the payment) and that the Department has complied with these regulations.

(b) *When another agency is owed the debt.* The Department will use salary offset against one of its employees who is indebted to another agency if requested to do so by that agency. Such a request must be accompanied by a certification by the requesting agency that the person owes the debt (including the amount) and that the procedural requirements of 5 U.S.C. 5514 and 5 CFR part 550, subpart K, have been met.

(c) Requests by another Federal Department or agency for Department cooperation in offsetting the salary of one of its employees must be directed to the Director for Personnel and Civil Rights, Room 5001, U.S. Department of Commerce, Herbert C. Hoover Building, 14th and Constitution Ave., NW., Washington, DC 20230.

§ 22.12 Procedures for salary offset—When deductions may begin.

(a) Deductions to liquidate an employee's debt will be by the method and in the amount stated in the Secretary's Notice of Intent to collect from the employee's current pay.

(b) If the employee filed a timely petition for hearing, deductions will begin after the hearing official has provided the employee with a hearing, and the final written decision is in favor of the Secretary.

(c) If an employee retires or resigns before collection of the amount of the indebtedness is completed, the remaining indebtedness will be collected according to the procedures for administrative offset (15 CFR 21).

§ 22.13 Procedures for salary offset—Types of collection.

A debt will be collected in a lump-sum or in installments. Collection will be by lump-sum collections unless the amount of the debt exceeds 15 percent of disposable pay. In these cases, deduction will be by installments.

§ 22.14 Procedures for salary offset—Methods of collection.

(a) *General.* A debt will be collected by deductions at officially established pay intervals from an employee's current pay account, unless the employee and the Secretary agree to alternative arrangements for repayment.

(b) *Installment deductions.* Installment deductions will be made over a period not greater than the anticipated period of employment. The size and frequency of installment deductions will bear a reasonable relation to the size of the debt and the employee's ability to pay. However, the amount deducted for any period will not exceed 15 percent of the disposable pay from which the deduction is made; unless the employee has agreed in writing to the deduction of a greater amount. If possible, the installment payment will be sufficient in size and frequency to liquidate the debt in three years. Installment payments of less than $25 per pay period or $50 a month will be accepted only in the most unusual circumstances.

(c) *Sources of deductions.* The Department will make deductions from the employee's pay.

§ 22.15 Procedures for salary offset—Imposition of interest, penalties, and administrative costs.

These charges will be made on installment payments in accordance with the Office of Personnel Management regulations (5 CFR 550.1104(n)) and the requirements contained in the FCCS (4 CFR 102.13).

§ 22.16 Non-waiver of rights.

So long as there are no statutory or contractual provisions to the contrary, no employee involuntary payment (of all or a portion of a debt) collected under these regulations will be interpreted as a waiver of any rights that the employee may have under 5 U.S.C. 5514, these implementing regulations, or any other provision of contract or law.

§ 22.17 Refunds.

The Department will refund promptly to the appropriate individual amounts offset under these regulations when:

(a) A debt is waived or otherwise found not owing the United States (unless expressly prohibited by statute or regulation); or

(b) The Department is directed by an administrative or judicial order to refund amounts deducted from the employee's current pay.

PART 23—USE OF PENALTY MAIL IN THE LOCATION AND RECOVERY OF MISSING CHILDREN

Sec.

23.1 Purpose.
23.2 Contact person.
23.3 Plan.
23.4 Cost and percentage estimates.
23.5 Report to the Office of Juvenile Justice and Delinquency Prevention.
23.6 Definitions.
23.7 Notice to Department of Commerce organizational units of implementation and procedures.

AUTHORITY: 39 U.S.C. 3220(a)(2); 5 U.S.C. 301.

SOURCE: 51 FR 46614, Dec. 24, 1986, unless otherwise noted.

§ 23.1 Purpose.

These regulations are intended to comply with 39 U.S.C. 3220(a)(2), and

the Office of Juvenile Justice and Delinquency Prevention (OJJDP) guidelines (50 FR 46622), to assist in the location and recovery of missing children through the use of penalty mail.

§ 23.2 Contact person.

Tim Coss, Office of Administrative Services Operations, U.S. Department of Commerce (H2063), 14th and Constitution Ave., NW., Washington, DC 20230, Telephone (202) 377–2108.

§ 23.3 Plan.

(a) The Department of Commerce will supplement and expand the national effort to assist in the location and recovery of missing children through the economical use of missing children information in domestic penalty mail directed to the public and Federal employees.

(b) The Department of Commerce may include, on or inside authorized types of penalty mail, pictures and biographical data related to missing children, provided such use is determined to be cost effective. The authorized types of penalty mail include:

(1) All envelopes; and

(2) Self-mailer publications (newsletters, bulletins, etc.) with a shelf-life of no more than 90 days.

(c) The manner in which pictures and biographical data may be used includes:

(1) Printing on envelopes at the time they are initially printed with the United States Postal Service (USPS) required postal code identification;

(2) Printed inserts that are placed in envelopes along with other mailing material;

(3) Stickers that are printed and placed on envelopes prior to mailing; and

(4) Printing as part of the content of self-mailers such as bureau newsletters, bulletins, etc.

(d) Missing children information will not be placed on letter-size envelopes in the areas described as the ''Penalty Indicia Area,'' ''OCR Read Area,'' ''Bar Code Read Area,'' and ''Return Address Area'' per Appendix A of the OJJDP guidelines.

(e) The National Center for Missing and Exploited Children (National Center) will be the sole source from which the Department of Commerce will obtain the camera-ready and other photographic and biographical materials for use by organizational units. Photographs which were reasonably current as of the time of the child's disappearance shall be the only acceptable form of visual media or pictorial likeness used on or in penalty mail.

(f) The Department of Commerce will remove all printed penalty mail envelopes and other materials from circulation or other use (i.e., use or destroy) within 90 days of notification by the National Center of the need to withdraw penalty mail envelopes and other materials related to a particular child from circulation. The Department of Commerce will not include missing children information on blank pages or covers of items such as those to be included in the Superintendent of Documents' Sales Program, or to be distributed to Depository Libraries, as such material generally could not be withdrawn from use within 90 days of notification. The National Center will be responsible for immediately notifying the Department Contact Person, in writing, of the need to withdraw from circulation penalty mail envelopes and other materials related to a particular child.

(g) The Department of Commerce will give priority:

(1) To penalty mail that is addressed to the public for receipt in the United States, its territories and possessions; and

(2) To inter- and intra-agency publications and other media that will be widely disseminated to and viewed by Federal employees.

(h) All suggestions and/or recommendations for innovative, cost-effective techniques should be forwarded to the Department Contact Person. The Department Contact Person shall conduct biannual meetings of departmental representatives to discuss the current plan and recommendations for future plans.

(i) This shall be the sole regulation implementing this program for the Department of Commerce.

§ 23.4 Cost and percentage estimates.

It is estimated that this program will cost the Department of Commerce

$39,530 in the first year. It is the Department of Commerce's estimate that 9% of its penalty mail will transmit missing children photographs and information when the program is fully implemented.

§ 23.5 Report to the Office of Juvenile Justice and Delinquency Prevention.

The Department of Commerce will compile and submit a consolidated report to OJJDP, by June 30, 1987, on its experience in implementation of 39 U.S.C. 3220(a) (2), the OJJDP guidelines, and the Department of Commerce's regulation. This report will cover the period from December 24, 1986 through March 31, 1987, and provide detail on:

(a) The Department of Commerce's experience in implementation (including problems encountered), successful and/or innovative methods adopted to use missing children photographs and information on or in penalty mail, the estimated number of pieces of penalty mail containing such information, and the percentage of total penalty mail directed to the public which included missing children information.

(b) The estimated total cost to implement the program, with supporting detail, and

(c) Recommendations for changes in the program to make it more effective.

§ 23.6 Definitions.

(a) *Operating units.* Bureaus and other organizational entities outside the Office of the Secretary charged with carrying out specified substantive functions (i.e., programs).

(b) *Organizational units.* The organizational units within the Department of Commerce are:

Office of the Secretary
Bureau of Economic Analysis
Economic Development Administration
Bureau of the Census
International Trade Administration
Minority Business Development Agency
National Bureau of Standards
National Oceanic and Atmospheric Administration
National Telecommunications and Information Administration
National Technical Information Service
Patent and Trademark Office
United States Travel and Tourism Administration

§ 23.7 Notice to Department of Commerce organizational units of implementation and procedures.

Following are roles and responsibilities for the program within the Department of Commerce.

(a) The Department Contact Person shall:

(1) Serve as the Department of Commerce's sole representative for ordering materials, including camera-ready negatives, from the National Center,

(2) Serve as the Department of Commerce's sole supplier of materials to Operating Units,

(3) Maintain a current list of personnel within each Operating Unit who are authorized to order materials,

(4) Notify Operating Units whenever permission to use information on a missing child has been withdrawn,

(5) Ensure that only current missing children materials are distributed to Operating Units, and that only those requests from authorized departmental representatives are filled,

(6) Prepare all required departmental reports on the program,

(7) Promulgate any departmentwide operating instructions deemed appropriate for the program, and

(8) Chair biannual meetings of departmental representatives to discuss the program and identify additional opportunities to use the missing children data with penalty mail.

(b) The Head of each Operating Unit (and for the Office of the Secretary, the Director of the Office of Administrative Services Operations), or his/her representative, shall:

(1) Designate a single person to act as the Operating Unit's representative to the Department for requesting and controlling missing children materials and receiving notification to withdraw materials from use (an alternative may be designated to act in the representative's absence),

(2) Provide the Department Contact Person with the name, title, telephone number, and room number of the Operating Unit's representative for the program (and also for the alternate, if one is designated), and notify the Department of changes when they occur,

(3) Ensure that the shelf-life of printed penalty mail materials containing missing children information is limited to a maximum of three months,

(4) Ensure that information on a child is not used once permission has been withdrawn and the shelf-life for the material would keep the information available for greater than 90 days after the date that permission to use it was withdrawn,

(5) Direct that the Operating Unit representative (or alternate) order missing children information, as appropriate, only from the Department Contact Person,

(6) Comply with policies, procedures, and operating instructions issued by the Department,

(7) Maintain necessary information to prepare required reports and submit them in accordance with requirements,

(8) Provide only current camera-ready and other photographic and biographical materials to printers, including those at the Administrative Support Centers, and

(9) Otherwise determine and control the use of missing children materials and information by the Operating Unit.

(c) The Director of each Administrative Support Center, or his/her representatives, shall:

(1) Cooperate with serviced Operating Units to promote the use of missing children information on penalty mail,

(2) As directed by an Operating Unit, utilize camera-ready and other photographic and biographical material provided by the Operating Unit in preparation of material for use with penalty mail, and

(3) Assure that any printing performed or procured under its direction is in accordance with the type of material and the manner of presentation as prescribed in this regulation.

PART 24—UNIFORM ADMINISTRATIVE REQUIREMENTS FOR GRANTS AND COOPERATIVE AGREEMENTS TO STATE AND LOCAL GOVERNMENTS

Subpart A—General

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Subpart E—Entitlements [Reserved]

AUTHORITY: 5 U.S.C. 301.

SOURCE: 53 FR 8048, 8087, Mar. 11, 1988, unless otherwise noted.

EDITORIAL NOTE: For additional information, see related documents published at 49 FR 24958, June 18, 1984, 52 FR 20178, May 29, 1987, and 53 FR 8028, March 11, 1988.

Subpart A—General

§ 24.1 Purpose and scope of this part.

This part establishes uniform administrative rules for Federal grants and cooperative agreements and subawards to State, local and Indian tribal governments.

§ 24.2 Scope of subpart.

This subpart contains general rules pertaining to this part and procedures for control of exceptions from this part.

§ 24.3 Definitions.

As used in this part:

Accrued expenditures mean the charges incurred by the grantee during a given period requiring the provision of funds for: (1) Goods and other tangible property received; (2) services performed by employees, contractors, subgrantees, subcontractors, and other payees; and (3) other amounts becoming owed under programs for which no current services or performance is required, such as annuities, insurance claims, and other benefit payments.

Accrued income means the sum of: (1) Earnings during a given period from services performed by the grantee and goods and other tangible property delivered to purchasers, and (2) amounts becoming owed to the grantee for which no current services or performance is required by the grantee.

Acquisition cost of an item of purchased equipment means the net invoice unit price of the property including the cost of modifications, attachments, accessories, or auxiliary apparatus necessary to make the property usable for the purpose for which it was acquired. Other charges such as the cost of installation, transportation, taxes, duty or protective in-transit insurance, shall be included or excluded from the unit acquisition cost in accordance with the grantee's regular accounting practices.

Administrative requirements mean those matters common to grants in general, such as financial management, kinds and frequency of reports, and retention of records. These are distinguished from *programmatic* requirements, which concern matters that can be treated only on a program-by-program or grant-by-grant basis, such as kinds of activities that can be supported by grants under a particular program.

Awarding agency means (1) with respect to a grant, the Federal agency, and (2) with respect to a subgrant, the party that awarded the subgrant.

Cash contributions means the grantee's cash outlay, including the outlay of money contributed to the grantee or subgrantee by other public agencies and institutions, and private organizations and individuals. When authorized by Federal legislation, Federal funds received from other assistance agreements may be considered as grantee or subgrantee cash contributions.

Contract means (except as used in the definitions for *grant* and *subgrant* in this section and except where qualified by *Federal*) a procurement contract under a grant or subgrant, and means a procurement subcontract under a contract.

Cost sharing or matching means the value of the third party in-kind contributions and the portion of the costs of a federally assisted project or program not borne by the Federal Government.

Cost-type contract means a contract or subcontract under a grant in which the contractor or subcontractor is paid on the basis of the costs it incurs, with or without a fee.

Equipment means tangible, nonexpendable, personal property having a useful life of more than one year and an acquisition cost of $5,000 or more per unit. A grantee may use its own definition of equipment provided that such definition would at least include all equipment defined above.

Expenditure report means: (1) For nonconstruction grants, the SF–269 ''Financial Status Report'' (or other equivalent report); (2) for construction grants, the SF–271 ''Outlay Report and Request for Reimbursement'' (or other equivalent report).

Federally recognized Indian tribal government means the governing body or a governmental agency of any Indian tribe, band, nation, or other organized group or community (including any Native village as defined in section 3 of the Alaska Native Claims Settlement

Act, 85 Stat 688) certified by the Secretary of the Interior as eligible for the special programs and services provided by him through the Bureau of Indian Affairs.

Government means a State or local government or a federally recognized Indian tribal government.

Grant means an award of financial assistance, including cooperative agreements, in the form of money, or property in lieu of money, by the Federal Government to an eligible grantee. The term does not include technical assistance which provides services instead of money, or other assistance in the form of revenue sharing, loans, loan guarantees, interest subsidies, insurance, or direct appropriations. Also, the term does not include assistance, such as a fellowship or other lump sum award, which the grantee is not required to account for.

Grantee means the government to which a grant is awarded and which is accountable for the use of the funds provided. The grantee is the entire legal entity even if only a particular component of the entity is designated in the grant award document.

Local government means a county, municipality, city, town, township, local public authority (including any public and Indian housing agency under the United States Housing Act of 1937) school district, special district, intrastate district, council of governments (whether or not incorporated as a nonprofit corporation under State law), any other regional or interstate government entity, or any agency or instrumentality of a local government.

Obligations means the amounts of orders placed, contracts and subgrants awarded, goods and services received, and similar transactions during a given period that will require payment by the grantee during the same or a future period.

OMB means the United States Office of Management and Budget.

Outlays (expenditures) mean charges made to the project or program. They may be reported on a cash or accrual basis. For reports prepared on a cash basis, outlays are the sum of actual cash disbursement for direct charges for goods and services, the amount of indirect expense incurred, the value of in-kind contributions applied, and the amount of cash advances and payments made to contractors and subgrantees. For reports prepared on an accrued expenditure basis, outlays are the sum of actual cash disbursements, the amount of indirect expense incurred, the value of inkind contributions applied, and the new increase (or decrease) in the amounts owed by the grantee for goods and other property received, for services performed by employees, contractors, subgrantees, subcontractors, and other payees, and other amounts becoming owed under programs for which no current services or performance are required, such as annuities, insurance claims, and other benefit payments.

Percentage of completion method refers to a system under which payments are made for construction work according to the percentage of completion of the work, rather than to the grantee's cost incurred.

Prior approval means documentation evidencing consent prior to incurring specific cost.

Real property means land, including land improvements, structures and appurtenances thereto, excluding movable machinery and equipment.

Share, when referring to the awarding agency's portion of real property, equipment or supplies, means the same percentage as the awarding agency's portion of the acquiring party's total costs under the grant to which the acquisition costs under the grant to which the acquisition cost of the property was charged. Only costs are to be counted—not the value of third-party in-kind contributions.

State means any of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, or any agency or instrumentality of a State exclusive of local governments. The term does not include any public and Indian housing agency under United States Housing Act of 1937.

Subgrant means an award of financial assistance in the form of money, or property in lieu of money, made under a grant by a grantee to an eligible subgrantee. The term includes financial

assistance when provided by contractual legal agreement, but does not include procurement purchases, nor does it include any form of assistance which is excluded from the definition of *grant* in this part.

Subgrantee means the government or other legal entity to which a subgrant is awarded and which is accountable to the grantee for the use of the funds provided.

Supplies means all tangible personal property other than *equipment* as defined in this part.

Suspension means depending on the context, either (1) temporary withdrawal of the authority to obligate grant funds pending corrective action by the grantee or subgrantee or a decision to terminate the grant, or (2) an action taken by a suspending official in accordance with agency regulations implementing E.O. 12549 to immediately exclude a person from participating in grant transactions for a period, pending completion of an investigation and such legal or debarment proceedings as may ensue.

Termination means permanent withdrawal of the authority to obligate previously-awarded grant funds before that authority would otherwise expire. It also means the voluntary relinquishment of that authority by the grantee or subgrantee. *Termination* does not include: (1) Withdrawal of funds awarded on the basis of the grantee's underestimate of the unobligated balance in a prior period; (2) Withdrawal of the unobligated balance as of the expiration of a grant; (3) Refusal to extend a grant or award additional funds, to make a competing or noncompeting continuation, renewal, extension, or supplemental award; or (4) voiding of a grant upon determination that the award was obtained fraudulently, or was otherwise illegal or invalid from inception.

Terms of a grant or subgrant mean all requirements of the grant or subgrant, whether in statute, regulations, or the award document.

Third party in-kind contributions mean property or services which benefit a federally assisted project or program and which are contributed by non-Federal third parties without charge to the grantee, or a cost-type contractor under the grant agreement.

Unliquidated obligations for reports prepared on a cash basis mean the amount of obligations incurred by the grantee that has not been paid. For reports prepared on an accrued expenditure basis, they represent the amount of obligations incurred by the grantee for which an outlay has not been recorded.

Unobligated balance means the portion of the funds authorized by the Federal agency that has not been obligated by the grantee and is determined by deducting the cumulative obligations from the cumulative funds authorized.

§ 24.4 Applicability.

(a) *General.* Subparts A through D of this part apply to all grants and subgrants to governments, except where inconsistent with Federal statutes or with regulations authorized in accordance with the exception provision of § 24.6, or:

(1) Grants and subgrants to State and local institutions of higher education or State and local hospitals.

(2) The block grants authorized by the Omnibus Budget Reconciliation Act of 1981 (Community Services; Preventive Health and Health Services; Alcohol, Drug Abuse, and Mental Health Services; Maternal and Child Health Services; Social Services; Low-Income Home Energy Assistance; States' Program of Community Development Block Grants for Small Cities; and Elementary and Secondary Education other than programs administered by the Secretary of Education under Title V, Subtitle D, Chapter 2, Section 583—the Secretary's discretionary grant program) and Titles I–III of the Job Training Partnership Act of 1982 and under the Public Health Services Act (Section 1921), Alcohol and Drug Abuse Treatment and Rehabilitation Block Grant and Part C of Title V, Mental Health Service for the Homeless Block Grant).

(3) Entitlement grants to carry out the following programs of the Social Security Act:

(i) Aid to Needy Families with Dependent Children (Title IV–A of the Act, not including the Work Incentive Program (WIN) authorized by section

402(a)19(G); HHS grants for WIN are subject to this part);

(ii) Child Support Enforcement and Establishment of Paternity (Title IV–D of the Act);

(iii) Foster Care and Adoption Assistance (Title IV–E of the Act);

(iv) Aid to the Aged, Blind, and Disabled (Titles I, X, XIV, and XVI–AABD of the Act); and

(v) Medical Assistance (Medicaid) (Title XIX of the Act) not including the State Medicaid Fraud Control program authorized by section 1903(a)(6)(B).

(4) Entitlement grants under the following programs of The National School Lunch Act:

(i) School Lunch (section 4 of the Act),

(ii) Commodity Assistance (section 6 of the Act),

(iii) Special Meal Assistance (section 11 of the Act),

(iv) Summer Food Service for Children (section 13 of the Act), and

(v) Child Care Food Program (section 17 of the Act).

(5) Entitlement grants under the following programs of The Child Nutrition Act of 1966:

(i) Special Milk (section 3 of the Act), and

(ii) School Breakfast (section 4 of the Act).

(6) Entitlement grants for State Administrative expenses under The Food Stamp Act of 1977 (section 16 of the Act).

(7) A grant for an experimental, pilot, or demonstration project that is also supported by a grant listed in paragraph (a)(3) of this section;

(8) Grant funds awarded under subsection 412(e) of the Immigration and Nationality Act (8 U.S.C. 1522(e)) and subsection 501(a) of the Refugee Education Assistance Act of 1980 (Pub. L. 96–422, 94 Stat. 1809), for cash assistance, medical assistance, and supplemental security income benefits to refugees and entrants and the administrative costs of providing the assistance and benefits;

(9) Grants to local education agencies under 20 U.S.C. 236 through 241–1(a), and 242 through 244 (portions of the Impact Aid program), except for 20 U.S.C. 238(d)(2)(c) and 240(f) (Entitlement Increase for Handicapped Children); and

(10) Payments under the Veterans Administration's State Home Per Diem Program (38 U.S.C. 641(a)).

(b) *Entitlement programs.* Entitlement programs enumerated above in §24.4(a)(3) through (8) are subject to subpart E.

§24.5 Effect on other issuances.

All other grants administration provisions of codified program regulations, program manuals, handbooks and other nonregulatory materials which are inconsistent with this part are superseded, except to the extent they are required by statute, or authorized in accordance with the exception provision in §24.6.

§24.6 Additions and exceptions.

(a) For classes of grants and grantees subject to this part, Federal agencies may not impose additional administrative requirements except in codified regulations published in the FEDERAL REGISTER.

(b) Exceptions for classes of grants or grantees may be authorized only by OMB.

(c) Exceptions on a case-by-case basis and for subgrantees may be authorized by the affected Federal agencies.

Subpart B—Pre-Award Requirements

§24.10 Forms for applying for grants.

(a) *Scope.* (1) This section prescribes forms and instructions to be used by governmental organizations (except hospitals and institutions of higher education operated by a government) in applying for grants. This section is not applicable, however, to formula grant programs which do not require applicants to apply for funds on a project basis.

(2) This section applies only to applications to Federal agencies for grants, and is not required to be applied by grantees in dealing with applicants for subgrants. However, grantees are encouraged to avoid more detailed or burdensome application requirements for subgrants.

(b) *Authorized forms and instructions for governmental organizations.* (1) In applying for grants, applicants shall only use standard application forms or those prescribed by the granting agency with

the approval of OMB under the Paperwork Reduction Act of 1980.

(2) Applicants are not required to submit more than the original and two copies of preapplications or applications.

(3) Applicants must follow all applicable instructions that bear OMB clearance numbers. Federal agencies may specify and describe the programs, functions, or activities that will be used to plan, budget, and evaluate the work under a grant. Other supplementary instructions may be issued only with the approval of OMB to the extent required under the Paperwork Reduction Act of 1980. For any standard form, except the SF–424 facesheet, Federal agencies may shade out or instruct the applicant to disregard any line item that is not needed.

(4) When a grantee applies for additional funding (such as a continuation or supplemental award) or amends a previously submitted application, only the affected pages need be submitted. Previously submitted pages with information that is still current need not be resubmitted.

§ 24.11 State plans.

(a) *Scope.* The statutes for some programs require States to submit plans before receiving grants. Under regulations implementing Executive Order 12372, ''Intergovernmental Review of Federal Programs,'' States are allowed to simplify, consolidate and substitute plans. This section contains additional provisions for plans that are subject to regulations implementing the Executive order.

(b) *Requirements.* A State need meet only Federal administrative or programmatic requirements for a plan that are in statutes or codified regulations.

(c) *Assurances.* In each plan the State will include an assurance that the State shall comply with all applicable Federal statutes and regulations in effect with respect to the periods for which it receives grant funding. For this assurance and other assurances required in the plan, the State may:

(1) Cite by number the statutory or regulatory provisions requiring the assurances and affirm that it gives the assurances required by those provisions,

(2) Repeat the assurance language in the statutes or regulations, or

(3) Develop its own language to the extent permitted by law.

(d) *Amendments.* A State will amend a plan whenever necessary to reflect: (1) New or revised Federal statutes or regulations or (2) a material change in any State law, organization, policy, or State agency operation. The State will obtain approval for the amendment and its effective date but need submit for approval only the amended portions of the plan.

§ 24.12 Special grant or subgrant conditions for "high-risk" grantees.

(a) A grantee or subgrantee may be considered ''high risk'' if an awarding agency determines that a grantee or subgrantee:

(1) Has a history of unsatisfactory performance, or

(2) Is not financially stable, or

(3) Has a management system which does not meet the management standards set forth in this part, or

(4) Has not conformed to terms and conditions of previous awards, or

(5) Is otherwise not responsible; and if the awarding agency determines that an award will be made, special conditions and/or restrictions shall correspond to the high risk condition and shall be included in the award.

(b) Special conditions or restrictions may include:

(1) Payment on a reimbursement basis;

(2) Withholding authority to proceed to the next phase until receipt of evidence of acceptable performance within a given funding period;

(3) Requiring additional, more detailed financial reports;

(4) Additional project monitoring;

(5) Requiring the grantee or subgrantee to obtain technical or management assistance; or

(6) Establishing additional prior approvals.

(c) If an awarding agency decides to impose such conditions, the awarding official will notify the grantee or subgrantee as early as possible, in writing, of:

(1) The nature of the special conditions/restrictions;

(2) The reason(s) for imposing them;

(3) The corrective actions which must be taken before they will be removed and the time allowed for completing the corrective actions, and

(4) The method of requesting reconsideration of the conditions/restrictions imposed.

Subpart C—Post-Award Requirements

FINANCIAL ADMINISTRATION

§24.20 Standards for financial management systems.

(a) A State must expand and account for grant funds in accordance with State laws and procedures for expending and accounting for its own funds. Fiscal control and accounting procedures of the State, as well as its subgrantees and cost-type contractors, must be sufficient to—

(1) Permit preparation of reports required by this part and the statutes authorizing the grant, and

(2) Permit the tracing of funds to a level of expenditures adequate to establish that such funds have not been used in violation of the restrictions and prohibitions of applicable statutes.

(b) The financial management systems of other grantees and subgrantees must meet the following standards:

(1) *Financial reporting.* Accurate, current, and complete disclosure of the financial results of financially assisted activities must be made in accordance with the financial reporting requirements of the grant or subgrant.

(2) *Accounting records.* Grantees and subgrantees must maintain records which adequately identify the source and application of funds provided for financially-assisted activities. These records must contain information pertaining to grant or subgrant awards and authorizations, obligations, unobligated balances, assets, liabilities, outlays or expenditures, and income.

(3) *Internal control.* Effective control and accountability must be maintained for all grant and subgrant cash, real and personal property, and other assets. Grantees and subgrantees must adequately safeguard all such property and must assure that it is used solely for authorized purposes.

(4) *Budget control.* Actual expenditures or outlays must be compared with budgeted amounts for each grant or subgrant. Financial information must be related to performance or productivity data, including the development of unit cost information whenever appropriate or specifically required in the grant or subgrant agreement. If unit cost data are required, estimates based on available documentation will be accepted whenever possible.

(5) *Allowable cost.* Applicable OMB cost principles, agency program regulations, and the terms of grant and subgrant agreements will be followed in determining the reasonableness, allowability, and allocability of costs.

(6) *Source documentation.* Accounting records must be supported by such source documentation as cancelled checks, paid bills, payrolls, time and attendance records, contract and subgrant award documents, etc.

(7) *Cash management.* Procedures for minimizing the time elapsing between the transfer of funds from the U.S. Treasury and disbursement by grantees and subgrantees must be followed whenever advance payment procedures are used. Grantees must establish reasonable procedures to ensure the receipt of reports on subgrantees' cash balances and cash disbursements in sufficient time to enable them to prepare complete and accurate cash transactions reports to the awarding agency. When advances are made by letter-of-credit or electronic transfer of funds methods, the grantee must make drawdowns as close as possible to the time of making disbursements. Grantees must monitor cash drawdowns by their subgrantees to assure that they conform substantially to the same standards of timing and amount as apply to advances to the grantees.

(c) An awarding agency may review the adequacy of the financial management system of any applicant for financial assistance as part of a preaward review or at any time subsequent to award.

§ 24.21 Payment.

(a) *Scope.* This section prescribes the basic standard and the methods under which a Federal agency will make payments to grantees, and grantees will make payments to subgrantees and contractors.

(b) *Basic standard.* Methods and procedures for payment shall minimize the time elapsing between the transfer of funds and disbursement by the grantee or subgrantee, in accordance with Treasury regulations at 31 CFR Part 205.

(c) *Advances.* Grantees and subgrantees shall be paid in advance, provided they maintain or demonstrate the willingness and ability to maintain procedures to minimize the time elapsing between the transfer of the funds and their disbursement by the grantee or subgrantee.

(d) *Reimbursement.* Reimbursement shall be the preferred method when the requirements in paragraph (c) of this section are not met. Grantees and subgrantees may also be paid by reimbursement for any construction grant. Except as otherwise specified in regulation, Federal agencies shall not use the percentage of completion method to pay construction grants. The grantee or subgrantee may use that method to pay its construction contractor, and if it does, the awarding agency's payments to the grantee or subgrantee will be based on the grantee's or subgrantee's actual rate of disbursement.

(e) *Working capital advances.* If a grantee cannot meet the criteria for advance payments described in paragraph (c) of this section, and the Federal agency has determined that reimbursement is not feasible because the grantee lacks sufficient working capital, the awarding agency may provide cash or a working capital advance basis. Under this procedure the awarding agency shall advance cash to the grantee to cover its estimated disbursement needs for an initial period generally geared to the grantee's disbursing cycle. Thereafter, the awarding agency shall reimburse the grantee for its actual cash disbursements. The working capital advance method of payment shall not be used by grantees or subgrantees if the reason for using such method is the unwillingness or inability of the grantee to provide timely advances to the subgrantee to meet the subgrantee's actual cash disbursements.

(f) *Effect of program income, refunds, and audit recoveries on payment.* (1) Grantees and subgrantees shall disburse repayments to and interest earned on a revolving fund before requesting additional cash payments for the same activity.

(2) Except as provided in paragraph (f)(1) of this section, grantees and subgrantees shall disburse program income, rebates, refunds, contract settlements, audit recoveries and interest earned on such funds before requesting additional cash payments.

(g) *Withholding payments.* (1) Unless otherwise required by Federal statute, awarding agencies shall not withhold payments for proper charges incurred by grantees or subgrantees unless—

(i) The grantee or subgrantee has failed to comply with grant award conditions or

(ii) The grantee or subgrantee is indebted to the United States.

(2) Cash withheld for failure to comply with grant award condition, but without suspension of the grant, shall be released to the grantee upon subsequent compliance. When a grant is suspended, payment adjustments will be made in accordance with § 24.43(c).

(3) A Federal agency shall not make payment to grantees for amounts that are withheld by grantees or subgrantees from payment to contractors to assure satisfactory completion of work. Payments shall be made by the Federal agency when the grantees or subgrantees actually disburse the withheld funds to the contractors or to escrow accounts established to assure satisfactory completion of work.

(h) *Cash depositories.* (1) Consistent with the national goal of expanding the opportunities for minority business enterprises, grantees and subgrantees are encouraged to use minority banks (a bank which is owned at least 50 percent by minority group members). A list of minority owned banks can be obtained from the Minority Business Development Agency, Department of Commerce, Washington, DC 20230.

(2) A grantee or subgrantee shall maintain a separate bank account only

when required by Federal-State agreement.

(i) *Interest earned on advances.* Except for interest earned on advances of funds exempt under the Intergovernmental Cooperation Act (31 U.S.C. 6501 *et seq.*) and the Indian Self-Determination Act (23 U.S.C. 450), grantees and subgrantees shall promptly, but at least quarterly, remit interest earned on advances to the Federal agency. The grantee or subgrantee may keep interest amounts up to $100 per year for administrative expenses.

§24.22 Allowable costs.

(a) *Limitation on use of funds.* Grant funds may be used only for:

(1) The allowable costs of the grantees, subgrantees and cost-type contractors, including allowable costs in the form of payments to fixed-price contractors; and

(2) Reasonable fees or profit to cost-type contractors but not any fee or profit (or other increment above allowable costs) to the grantee or subgrantee.

(b) *Applicable cost principles.* For each kind of organization, there is a set of Federal principles for determining allowable costs. Allowable costs will be determined in accordance with the cost principles applicable to the organization incurring the costs. The following chart lists the kinds of organizations and the applicable cost principles.

For the costs of a—	Use the principles in—
State, local or Indian tribal government.	OMB Circular A–87.
Private nonprofit organization other than an (1) institution of higher education, (2) hospital, or (3) organization named in OMB Circular A–122 as not subject to that circular.	OMB Circular A–122.
Educational institutions.	OMB Circular A–21.
For-profit organization other than a hospital and an organization named in OBM Circular A–122 as not subject to that circular.	48 CFR Part 31. Contract Cost Principles and Procedures, or uniform cost accounting standards that comply with cost principles acceptable to the Federal agency.

§24.23 Period of availability of funds.

(a) *General.* Where a funding period is specified, a grantee may charge to the award only costs resulting from obligations of the funding period unless carryover of unobligated balances is permitted, in which case the carryover balances may be charged for costs resulting from obligations of the subsequent funding period.

(b) *Liquidation of obligations.* A grantee must liquidate all obligations incurred under the award not later than 90 days after the end of the funding period (or as specified in a program regulation) to coincide with the submission of the annual Financial Status Report (SF–269). The Federal agency may extend this deadline at the request of the grantee.

§24.24 Matching or cost sharing.

(a) *Basic rule: Costs and contributions acceptable.* With the qualifications and exceptions listed in paragraph (b) of this section, a matching or cost sharing requirement may be satisfied by either or both of the following:

(1) Allowable costs incurred by the grantee, subgrantee or a cost-type contractor under the assistance agreement. This includes allowable costs borne by non-Federal grants or by others cash donations from non-Federal third parties.

(2) The value of third party in-kind contributions applicable to the period to which the cost sharing or matching requirements applies.

(b) *Qualifications and exceptions*—(1) *Costs borne by other Federal grant agreements.* Except as provided by Federal statute, a cost sharing or matching requirement may not be met by costs borne by another Federal grant. This prohibition does not apply to income earned by a grantee or subgrantee from a contract awarded under another Federal grant.

(2) *General revenue sharing.* For the purpose of this section, general revenue sharing funds distributed under 31 U.S.C. 6702 are not considered Federal grant funds.

(3) *Cost or contributions counted towards other Federal costs-sharing requirements.* Neither costs nor the values of third party in-kind contributions may count towards satisfying a cost sharing or matching requirement of a grant agreement if they have been or will be

counted towards satisfying a cost sharing or matching requirement of another Federal grant agreement, a Federal procurement contract, or any other award of Federal funds.

(4) *Costs financed by program income.* Costs financed by program income, as defined in § 24.25, shall not count towards satisfying a cost sharing or matching requirement unless they are expressly permitted in the terms of the assistance agreement. (This use of general program income is described in § 24.25(g).)

(5) *Services or property financed by income earned by contractors.* Contractors under a grant may earn income from the activities carried out under the contract in addition to the amounts earned from the party awarding the contract. No costs of services or property supported by this income may count toward satisfying a cost sharing or matching requirement unless other provisions of the grant agreement expressly permit this kind of income to be used to meet the requirement.

(6) *Records.* Costs and third party in-kind contributions counting towards satisfying a cost sharing or matching requirement must be verifiable from the records of grantees and subgrantee or cost-type contractors. These records must show how the value placed on third party in-kind contributions was derived. To the extent feasible, volunteer services will be supported by the same methods that the organization uses to support the allocability of regular personnel costs.

(7) *Special standards for third party in-kind contributions.* (i) Third party in-kind contributions count towards satisfying a cost sharing or matching requirement only where, if the party receiving the contributions were to pay for them, the payments would be allowable costs.

(ii) Some third party in-kind contributions are goods and services that, if the grantee, subgrantee, or contractor receiving the contribution had to pay for them, the payments would have been an indirect costs. Costs sharing or matching credit for such contributions shall be given only if the grantee, subgrantee, or contractor has established, along with its regular indirect cost rate, a special rate for allocating to individual projects or programs the value of the contributions.

(iii) A third party in-kind contribution to a fixed-price contract may count towards satisfying a cost sharing or matching requirement only if it results in:

(A) An increase in the services or property provided under the contract (without additional cost to the grantee or subgrantee) or

(B) A cost savings to the grantee or subgrantee.

(iv) The values placed on third party in-kind contributions for cost sharing or matching purposes will conform to the rules in the succeeding sections of this part. If a third party in-kind contribution is a type not treated in those sections, the value placed upon it shall be fair and reasonable.

(c) *Valuation of donated services*—(1) *Volunteer services.* Unpaid services provided to a grantee or subgrantee by individuals will be valued at rates consistent with those ordinarily paid for similar work in the grantee's or subgrantee's organization. If the grantee or subgrantee does not have employees performing similar work, the rates will be consistent with those ordinarily paid by other employers for similar work in the same labor market. In either case, a reasonable amount for fringe benefits may be included in the valuation.

(2) *Employees of other organizations.* When an employer other than a grantee, subgrantee, or cost-type contractor furnishes free of charge the services of an employee in the employee's normal line of work, the services will be valued at the employee's regular rate of pay exclusive of the employee's fringe benefits and overhead costs. If the services are in a different line of work, paragraph (c)(1) of this section applies.

(d) *Valuation of third party donated supplies and loaned equipment or space.* (1) If a third party donates supplies, the contribution will be valued at the market value of the supplies at the time of donation.

(2) If a third party donates the use of equipment or space in a building but retains title, the contribution will be valued at the fair rental rate of the equipment or space.

(e) *Valuation of third party donated equipment, buildings, and land.* If a third party donates equipment, buildings, or land, and title passes to a grantee or subgrantee, the treatment of the donated property will depend upon the purpose of the grant or subgrant, as follows:

(1) *Awards for capital expenditures.* If the purpose of the grant or subgrant is to assist the grantee or subgrantee in the acquisition of property, the market value of that property at the time of donation may be counted as cost sharing or matching,

(2) *Other awards.* If assisting in the acquisition of property is not the purpose of the grant or subgrant, paragraphs (e)(2) (i) and (ii) of this section apply:

(i) If approval is obtained from the awarding agency, the market value at the time of donation of the donated equipment or buildings and the fair rental rate of the donated land may be counted as cost sharing or matching. In the case of a subgrant, the terms of the grant agreement may require that the approval be obtained from the Federal agency as well as the grantee. In all cases, the approval may be given only if a purchase of the equipment or rental of the land would be approved as an allowable direct cost. If any part of the donated property was acquired with Federal funds, only the non-federal share of the property may be counted as cost-sharing or matching.

(ii) If approval is not obtained under paragraph (e)(2)(i) of this section, no amount may be counted for donated land, and only depreciation or use allowances may be counted for donated equipment and buildings. The depreciation or use allowances for this property are not treated as third party in-kind contributions. Instead, they are treated as costs incurred by the grantee or subgrantee. They are computed and allocated (usually as indirect costs) in accordance with the cost principles specified in §24.22, in the same way as depreciation or use allowances for purchased equipment and buildings. The amount of depreciation or use allowances for donated equipment and buildings is based on the property's market value at the time it was donated.

(f) *Valuation of grantee or subgrantee donated real property for construction/acquisition.* If a grantee or subgrantee donates real property for a construction or facilities acquisition project, the current market value of that property may be counted as cost sharing or matching. If any part of the donated property was acquired with Federal funds, only the non-federal share of the property may be counted as cost sharing or matching.

(g) *Appraisal of real property.* In some cases under paragraphs (d), (e) and (f) of this section, it will be necessary to establish the market value of land or a building or the fair rental rate of land or of space in a building. In these cases, the Federal agency may require the market value or fair rental value be set by an independent appraiser, and that the value or rate be certified by the grantee. This requirement will also be imposed by the grantee on subgrantees.

§24.25 Program income.

(a) *General.* Grantees are encouraged to earn income to defray program costs. Program income includes income from fees for services performed, from the use or rental of real or personal property acquired with grant funds, from the sale of commodities or items fabricated under a grant agreement, and from payments of principal and interest on loans made with grant funds. Except as otherwise provided in regulations of the Federal agency, program income does not include interest on grant funds, rebates, credits, discounts, refunds, etc. and interest earned on any of them.

(b) *Definition of program income.* Program income means gross income received by the grantee or subgrantee directly generated by a grant supported activity, or earned only as a result of the grant agreement during the grant period. ''During the grant period'' is the time between the effective date of the award and the ending date of the award reflected in the final financial report.

(c) *Cost of generating program income.* If authorized by Federal regulations or the grant agreement, costs incident to the generation of program income may be deducted from gross income to determine program income.

(d) *Governmental revenues.* Taxes, special assessments, levies, fines, and other such revenues raised by a grantee or subgrantee are not program income unless the revenues are specifically identified in the grant agreement or Federal agency regulations as program income.

(e) *Royalties.* Income from royalties and license fees for copyrighted material, patents, and inventions developed by a grantee or subgrantee is program income only if the revenues are specifically identified in the grant agreement or Federal agency regulations as program income. (See § 24.34.)

(f) *Property.* Proceeds from the sale of real property or equipment will be handled in accordance with the requirements of §§ 24.31 and 24.32.

(g) *Use of program income.* Program income shall be deducted from outlays which may be both Federal and non-Federal as described below, unless the Federal agency regulations or the grant agreement specify another alternative (or a combination of the alternatives). In specifying alternatives, the Federal agency may distinguish between income earned by the grantee and income earned by subgrantees and between the sources, kinds, or amounts of income. When Federal agencies authorize the alternatives in paragraphs (g) (2) and (3) of this section, program income in excess of any limits stipulated shall also be deducted from outlays.

(1) *Deduction.* Ordinarily program income shall be deducted from total allowable costs to determine the net allowable costs. Program income shall be used for current costs unless the Federal agency authorizes otherwise. Program income which the grantee did not anticipate at the time of the award shall be used to reduce the Federal agency and grantee contributions rather than to increase the funds committed to the project.

(2) *Addition.* When authorized, program income may be added to the funds committed to the grant agreement by the Federal agency and the grantee. The program income shall be used for the purposes and under the conditions of the grant agreement.

(3) *Cost sharing or matching.* When authorized, program income may be used to meet the cost sharing or matching requirement of the grant agreement. The amount of the Federal grant award remains the same.

(h) *Income after the award period.* There are no Federal requirements governing the disposition of program income earned after the end of the award period (i.e., until the ending date of the final financial report, see paragraph (a) of this section), unless the terms of the agreement or the Federal agency regulations provide otherwise.

§ 24.26 Non-Federal audit.

(a) *Basic rule.* Grantees and subgrantees are responsible for obtaining audits in accordance with the Single Audit Act Amendments of 1996 (31 U.S.C. 7501–7507) and revised OMB Circular A–133, ''Audits of States, Local Governments, and Non-Profit Organizations.'' The audits shall be made by an independent auditor in accordance with generally accepted government auditing standards covering financial audits.

(b) *Subgrantees.* State or local governments, as those terms are defined for purposes of the Single Audit Act Amendments of 1996, that provide Federal awards to a subgrantee, which expends $300,000 or more (or other amount as specified by OMB) in Federal awards in a fiscal year, shall:

(1) Determine whether State or local subgrantees have met the audit requirements of the Act and whether subgrantees covered by OMB Circular A–110, ''Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations,'' have met the audit requirements of the Act. Commercial contractors (private for-profit and private and governmental organizations) providing goods and services to State and local governments are not required to have a single audit performed. State and local governments should use their own procedures to ensure that the contractor has complied with laws and regulations affecting the expenditure of Federal funds;

(2) Determine whether the subgrantee spent Federal assistance funds provided in accordance with applicable

laws and regulations. This may be accomplished by reviewing an audit of the subgrantee made in accordance with the Act, Circular A–110, or through other means (e.g., program reviews) if the subgrantee has not had such an audit;

(3) Ensure that appropriate corrective action is taken within six months after receipt of the audit report in instance of noncompliance with Federal laws and regulations;

(4) Consider whether subgrantee audits necessitate adjustment of the grantee's own records; and

(5) Require each subgrantee to permit independent auditors to have access to the records and financial statements.

(c) *Auditor selection.* In arranging for audit services, §24.36 shall be followed.

[53 FR 8048, 8087, Mar. 11, 1988, as amended at 62 FR 45939, 45940, Aug. 29, 1997]

CHANGES, PROPERTY, AND SUBAWARDS

§24.30 Changes.

(a) *General.* Grantees and subgrantees are permitted to rebudget within the approved direct cost budget to meet unanticipated requirements and may make limited program changes to the approved project. However, unless waived by the awarding agency, certain types of post-award changes in budgets and projects shall require the prior written approval of the awarding agency.

(b) *Relation to cost principles.* The applicable cost principles (see §24.22) contain requirements for prior approval of certain types of costs. Except where waived, those requirements apply to all grants and subgrants even if paragraphs (c) through (f) of this section do not.

(c) *Budget changes*—(1) *Nonconstruction projects.* Except as stated in other regulations or an award document, grantees or subgrantees shall obtain the prior approval of the awarding agency whenever any of the following changes is anticipated under a nonconstruction award:

(i) Any revision which would result in the need for additional funding.

(ii) Unless waived by the awarding agency, cumulative transfers among direct cost categories, or, if applicable, among separately budgeted programs, projects, functions, or activities which exceed or are expected to exceed ten percent of the current total approved budget, whenever the awarding agency's share exceeds $100,000.

(iii) Transfer of funds allotted for training allowances (i.e., from direct payments to trainees to other expense categories).

(2) *Construction projects.* Grantees and subgrantees shall obtain prior written approval for any budget revision which would result in the need for additional funds.

(3) *Combined construction and nonconstruction projects.* When a grant or subgrant provides funding for both construction and nonconstruction activities, the grantee or subgrantee must obtain prior written approval from the awarding agency before making any fund or budget transfer from nonconstruction to construction or vice versa.

(d) *Programmatic changes.* Grantees or subgrantees must obtain the prior approval of the awarding agency whenever any of the following actions is anticipated:

(1) Any revision of the scope or objectives of the project (regardless of whether there is an associated budget revision requiring prior approval).

(2) Need to extend the period of availability of funds.

(3) Changes in key persons in cases where specified in an application or a grant award. In research projects, a change in the project director or principal investigator shall always require approval unless waived by the awarding agency.

(4) Under nonconstruction projects, contracting out, subgranting (if authorized by law) or otherwise obtaining the services of a third party to perform activities which are central to the purposes of the award. This approval requirement is in addition to the approval requirements of §24.36 but does not apply to the procurement of equipment, supplies, and general support services.

(e) *Additional prior approval requirements.* The awarding agency may not require prior approval for any budget revision which is not described in paragraph (c) of this section.

(f) *Requesting prior approval.* (1) A request for prior approval of any budget revision will be in the same budget formal the grantee used in its application and shall be accompanied by a narrative justification for the proposed revision.

(2) A request for a prior approval under the applicable Federal cost principles (see § 24.22) may be made by letter.

(3) A request by a subgrantee for prior approval will be addressed in writing to the grantee. The grantee will promptly review such request and shall approve or disapprove the request in writing. A grantee will not approve any budget or project revision which is inconsistent with the purpose or terms and conditions of the Federal grant to the grantee. If the revision, requested by the subgrantee would result in a change to the grantee's approved project which requires Federal prior approval, the grantee will obtain the Federal agency's approval before approving the subgrantee's request.

§ 24.31 Real property.

(a) *Title.* Subject to the obligations and conditions set forth in this section, title to real property acquired under a grant or subgrant will vest upon acquisition in the grantee or subgrantee respectively.

(b) *Use.* Except as otherwise provided by Federal statutes, real property will be used for the originally authorized purposes as long as needed for that purposes, and the grantee or subgrantee shall not dispose of or encumber its title or other interests.

(1) The Federal awarding agency may require the placing of appropriate notices of record to advise that property has been acquired or improved with Federal financial assistance, and that use and disposition conditions apply to the property.

(c) *Disposition.* When real property is no longer needed for the originally authorized purpose, the grantee or subgrantee will request disposition instructions from the awarding agency. The instructions will provide for one of the following alternatives:

(1) *Retention of title.* Retain title after compensating the awarding agency. The amount paid to the awarding agency will be computed by applying the awarding agency's percentage of participation in the cost of the original purchase to the fair market value of the property. However, in those situations where a grantee or subgrantee is disposing of real property acquired with grant funds and acquiring replacement real property under the same program, the net proceeds from the disposition may be used as an offset to the cost of the replacement property.

(2) *Sale of property.* Sell the property and compensate the awarding agency. The amount due to the awarding agency will be calculated by applying the awarding agency's percentage of participation in the cost of the original purchase to the proceeds of the sale after deduction of any actual and reasonable selling and fixing-up expenses. If the grant is still active, the net proceeds from sale may be offset against the original cost of the property. When a grantee or subgrantee is directed to sell property, sales procedures shall be followed that provide for competition to the extent practicable and result in the highest possible return.

(3) *Transfer of title.* Transfer title to the awarding agency or to a third-party designated/approved by the awarding agency. The grantee or subgrantee shall be paid an amount calculated by applying the grantee or subgrantee's percentage of participation in the purchase of the real property to the current fair market value of the property.

[53 FR 8048, Mar. 11, 1988, as amended at 53 FR 8049, Mar. 11, 1988]

§ 24.32 Equipment.

(a) *Title.* Subject to the obligations and conditions set forth in this section, title to equipment acquired under a grant or subgrant will vest upon acquisition in the grantee or subgrantee respectively.

(b) *States.* A State will use, manage, and dispose of equipment acquired under a grant by the State in accordance with State laws and procedures. Other grantees and subgrantees will follow paragraphs (c) through (e) of this section.

(c) *Use.* (1) Equipment shall be used by the grantee or subgrantee in the

program or project for which it was acquired as long as needed, whether or not the project or program continues to be supported by Federal funds. When no longer needed for the original program or project, the equipment may be used in other activities currently or previously supported by a Federal agency.

(2) The grantee or subgrantee shall also make equipment available for use on other projects or programs currently or previously supported by the Federal Government, providing such use will not interfere with the work on the projects or program for which it was originally acquired. First preference for other use shall be given to other programs or projects supported by the awarding agency. User fees should be considered if appropriate.

(3) Notwithstanding the encouragement in § 24.25(a) to earn program income, the grantee or subgrantee must not use equipment acquired with grant funds to provide services for a fee to compete unfairly with private companies that provide equivalent services, unless specifically permitted or contemplated by Federal statute.

(4) When acquiring replacement equipment, the grantee or subgrantee may use the equipment to be replaced as a trade-in or sell the property and use the proceeds to offset the cost of the replacement property, subject to the approval of the awarding agency.

(d) *Management requirements.* Procedures for managing equipment (including replacement equipment), whether acquired in whole or in part with grant funds, until disposition takes place will, as a minimum, meet the following requirements:

(1) Property records must be maintained that include a description of the property, a serial number or other identification number, the source of property, who holds title, the acquisition date, and cost of the property, percentage of Federal participation in the cost of the property, the location, use and condition of the property, and any ultimate disposition data including the date of disposal and sale price of the property.

(2) A physical inventory of the property must be taken and the results reconciled with the property records at least once every two years.

(3) A control system must be developed to ensure adequate safeguards to prevent loss, damage, or theft of the property. Any loss, damage, or theft shall be investigated.

(4) Adequate maintenance procedures must be developed to keep the property in good condition.

(5) If the grantee or subgrantee is authorized or required to sell the property, proper sales procedures must be established to ensure the highest possible return.

(e) *Disposition.* When original or replacement equipment acquired under a grant or subgrant is no longer needed for the original project or program or for other activities currently or previously supported by a Federal agency, disposition of the equipment will be made as follows:

(1) Items of equipment with a current per-unit fair market value of less than $5,000 may be retained, sold or otherwise disposed of with no further obligation to the awarding agency.

(2) Items of equipment with a current per unit fair market value in excess of $5,000 may be retained or sold and the awarding agency shall have a right to an amount calculated by multiplying the current market value or proceeds from sale by the awarding agency's share of the equipment.

(3) In cases where a grantee or subgrantee fails to take appropriate disposition actions, the awarding agency may direct the grantee or subgrantee to take excess and disposition actions.

(f) *Federal equipment.* In the event a grantee or subgrantee is provided federally-owned equipment:

(1) Title will remain vested in the Federal Government.

(2) Grantees or subgrantees will manage the equipment in accordance with Federal agency rules and procedures, and submit an annual inventory listing.

(3) When the equipment is no longer needed, the grantee or subgrantee will request disposition instructions from the Federal agency.

(g) *Right to transfer title.* The Federal awarding agency may reserve the right to transfer title to the Federal Government or a third part named by the

awarding agency when such a third party is otherwise eligible under existing statutes. Such transfers shall be subject to the following standards:

(1) The property shall be identified in the grant or otherwise made known to the grantee in writing.

(2) The Federal awarding agency shall issue disposition instruction within 120 calendar days after the end of the Federal support of the project for which it was acquired. If the Federal awarding agency fails to issue disposition instructions within the 120 calendar-day period the grantee shall follow § 24.32(e).

(3) When title to equipment is transferred, the grantee shall be paid an amount calculated by applying the percentage of participation in the purchase to the current fair market value of the property.

§ 24.33 Supplies.

(a) *Title.* Title to supplies acquired under a grant or subgrant will vest, upon acquisition, in the grantee or subgrantee respectively.

(b) *Disposition.* If there is a residual inventory of unused supplies exceeding $5,000 in total aggregate fair market value upon termination or completion of the award, and if the supplies are not needed for any other federally sponsored programs or projects, the grantee or subgrantee shall compensate the awarding agency for its share.

§ 24.34 Other property.

(a) *Copyrights.* The Federal awarding agency reserves a royalty-free, nonexclusive, and irrevocable license to reproduce, publish or otherwise use, and to authorize others to use, for Federal Government purposes:

(1) The copyright in any work developed under a grant, subgrant, or contract under a grant or subgrant; and

(2) Any rights of copyright to which a grantee, subgrantee, or a contractor purchases ownership with grant support.

(b) *Intangible property.* Title to such property as loans, notes, and other debt instruments (whether considered tangible or intangible) acquired under a grant or subgrant will vest upon acquisition in the grantee or subgrantee respectively. Such property will be used for the originally authorized purpose as long as needed for that purpose, and the grantee or subgrantee shall not dispose of or encumber its title or other interests. When no longer needed for the originally authorized purpose, disposition of such property will be made as provided in § 24.32(e).

[53 FR 8049, Mar. 11, 1988]

§ 24.35 Subawards to debarred and suspended parties.

Grantees and subgrantees must not make any award or permit any award (subgrant or contract) at any tier to any party which is debarred or suspended or is otherwise excluded from or ineligible for participation in Federal assistance programs under Executive Order 12549, ''Debarment and Suspension.''

§ 24.36 Procurement.

(a) *States.* When procuring property and services under a grant, a State will follow the same policies and procedures it uses for procurements from its non-Federal funds. The State will ensure that every purchase order or other contract includes any clauses required by Federal statutes and executive orders and their implementing regulations. Other grantees and subgrantees will follow paragraphs (b) through (i) in this section.

(b) *Procurement standards.* (1) Grantees and subgrantees will use their own procurement procedures which reflect applicable State and local laws and regulations, provided that the procurements conform to applicable Federal law and the standards identified in this section.

(2) Grantees and subgrantees will maintain a contract administration system which ensures that contractors perform in accordance with the terms, conditions, and specifications of their contracts or purchase orders.

(3) Grantees and subgrantees will maintain a written code of standards of conduct governing the performance of their employees engaged in the award and administration of contracts. No employee, officer or agent of the grantee or subgrantee shall participate in selection, or in the award or administration of a contract supported by Federal

funds if a conflict of interest, real or apparent, would be involved. Such a conflict would arise when:

(i) The employee, officer or agent,

(ii) Any member of his immediate family,

(iii) His or her partner, or

(iv) An organization which employs, or is about to employ, any of the above, has a financial or other interest in the firm selected for award. The grantee's or subgrantee's officers, employees or agents will neither solicit nor accept gratuities, favors or anything of monetary value from contractors, potential contractors, or parties to subagreements. Grantee and subgrantees may set minimum rules where the financial interest is not substantial or the gift is an unsolicited item of nominal intrinsic value. To the extent permitted by State or local law or regulations, such standards or conduct will provide for penalties, sanctions, or other disciplinary actions for violations of such standards by the grantee's and subgrantee's officers, employees, or agents, or by contractors or their agents. The awarding agency may in regulation provide additional prohibitions relative to real, apparent, or potential conflicts of interest.

(4) Grantee and subgrantee procedures will provide for a review of proposed procurements to avoid purchase of unnecessary or duplicative items. Consideration should be given to consolidating or breaking out procurements to obtain a more economical purchase. Where appropriate, an analysis will be made of lease versus purchase alternatives, and any other appropriate analysis to determine the most economical approach.

(5) To foster greater economy and efficiency, grantees and subgrantees are encouraged to enter into State and local intergovernmental agreements for procurement or use of common goods and services.

(6) Grantees and subgrantees are encouraged to use Federal excess and surplus property in lieu of purchasing new equipment and property whenever such use is feasible and reduces project costs.

(7) Grantees and subgrantees are encouraged to use value engineering clauses in contracts for construction projects of sufficient size to offer reasonable opportunities for cost reductions. Value engineering is a systematic and creative anaylsis of each contract item or task to ensure that its essential function is provided at the overall lower cost.

(8) Grantees and subgrantees will make awards only to responsible contractors possessing the ability to perform successfully under the terms and conditions of a proposed procurement. Consideration will be given to such matters as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources.

(9) Grantees and subgrantees will maintain records sufficient to detail the significant history of a procurement. These records will include, but are not necessarily limited to the following: rationale for the method of procurement, selection of contract type, contractor selection or rejection, and the basis for the contract price.

(10) Grantees and subgrantees will use time and material type contracts only—

(i) After a determination that no other contract is suitable, and

(ii) If the contract includes a ceiling price that the contractor exceeds at its own risk.

(11) Grantees and subgrantees alone will be responsible, in accordance with good administrative practice and sound business judgment, for the settlement of all contractual and administrative issues arising out of procurements. These issues include, but are not limited to source evaluation, protests, disputes, and claims. These standards do not relieve the grantee or subgrantee of any contractual responsibilities under its contracts. Federal agencies will not substitute their judgment for that of the grantee or subgrantee unless the matter is primarily a Federal concern. Violations of law will be referred to the local, State, or Federal authority having proper jurisdiction.

(12) Grantees and subgrantees will have protest procedures to handle and resolve disputes relating to their procurements and shall in all instances disclose information regarding the protest to the awarding agency. A

protestor must exhaust all administrative remedies with the grantee and subgrantee before pursuing a protest with the Federal agency. Reviews of protests by the Federal agency will be limited to:

(i) Violations of Federal law or regulations and the standards of this section (violations of State or local law will be under the jurisdiction of State or local authorities) and

(ii) Violations of the grantee's or subgrantee's protest procedures for failure to review a complaint or protest. Protests received by the Federal agency other than those specified above will be referred to the grantee or subgrantee.

(c) *Competition*. (1) All procurement transactions will be conducted in a manner providing full and open competition consistent with the standards of § 24.36. Some of the situations considered to be restrictive of competition include but are not limited to:

(i) Placing unreasonable requirements on firms in order for them to qualify to do business,

(ii) Requiring unnecessary experience and excessive bonding,

(iii) Noncompetitive pricing practices between firms or between affiliated companies,

(iv) Noncompetitive awards to consultants that are on retainer contracts,

(v) Organizational conflicts of interest,

(vi) Specifying only a ''brand name'' product instead of allowing ''an equal'' product to be offered and describing the performance of other relevant requirements of the procurement, and

(vii) Any arbitrary action in the procurement process.

(2) Grantees and subgrantees will conduct procurements in a manner that prohibits the use of statutorily or administratively imposed in-State or local geographical preferences in the evaluation of bids or proposals, except in those cases where applicable Federal statutes expressly mandate or encourage geographic preference. Nothing in this section preempts State licensing laws. When contracting for architectural and engineering (A/E) services, geographic location may be a selection criteria provided its application leaves an appropriate number of qualified firms, given the nature and size of the project, to compete for the contract.

(3) Grantees will have written selection procedures for procurement transactions. These procedures will ensure that all solicitations:

(i) Incorporate a clear and accurate description of the technical requirements for the material, product, or service to be procured. Such description shall not, in competitive procurements, contain features which unduly restrict competition. The description may include a statement of the qualitative nature of the material, product or service to be procured, and when necessary, shall set forth those minimum essential characteristics and standards to which it must conform if it is to satisfy its intended use. Detailed product specifications should be avoided if at all possible. When it is impractical or uneconomical to make a clear and accurate description of the technical requirements, a ''brand name or equal'' description may be used as a means to define the performance or other salient requirements of a procurement. The specific features of the named brand which must be met by offerors shall be clearly stated; and

(ii) Identify all requirements which the offerors must fulfill and all other factors to be used in evaluating bids or proposals.

(4) Grantees and subgrantees will ensure that all prequalified lists of persons, firms, or products which are used in acquiring goods and services are current and include enough qualified sources to ensure maximum open and free competition. Also, grantees and subgrantees will not preclude potential bidders from qualifying during the solicitation period.

(d) *Methods of procurement to be followed*. (1) Procurement by *small purchase procedures*. Small purchase procedures are those relatively simple and informal procurement methods for securing services, supplies, or other property that do not cost more than the simplified acquisition threshold fixed at 41 U.S.C. 403(11) (currently set at $100,000). If small purchase procedures are used, price or rate quotations shall be obtained from an adequate number of qualified sources.

(2) Procurement by *sealed bids* (formal advertising). Bids are publicly solicited and a firm-fixed-price contract (lump sum or unit price) is awarded to the responsible bidder whose bid, conforming with all the material terms and conditions of the invitation for bids, is the lowest in price. The sealed bid method is the preferred method for procuring construction, if the conditions in § 24.36(d)(2)(i) apply.

(i) In order for sealed bidding to be feasible, the following conditions should be present:

(A) A complete, adequate, and realistic specification or purchase description is available;

(B) Two or more responsible bidders are willing and able to compete effectively and for the business; and

(C) The procurement lends itself to a firm fixed price contract and the selection of the successful bidder can be made principally on the basis of price.

(ii) If sealed bids are used, the following requirements apply:

(A) The invitation for bids will be publicly advertised and bids shall be solicited from an adequate number of known suppliers, providing them sufficient time prior to the date set for opening the bids;

(B) The invitation for bids, which will include any specifications and pertinent attachments, shall define the items or services in order for the bidder to properly respond;

(C) All bids will be publicly opened at the time and place prescribed in the invitation for bids;

(D) A firm fixed-price contract award will be made in writing to the lowest responsive and responsible bidder. Where specified in bidding documents, factors such as discounts, transportation cost, and life cycle costs shall be considered in determining which bid is lowest. Payment discounts will only be used to determine the low bid when prior experience indicates that such discounts are usually taken advantage of; and

(E) Any or all bids may be rejected if there is a sound documented reason.

(3) Procurement by *competitive proposals.* The technique of competitive proposals is normally conducted with more than one source submitting an offer, and either a fixed-price or cost-reimbursement type contract is awarded. It is generally used when conditions are not appropriate for the use of sealed bids. If this method is used, the following requirements apply:

(i) Requests for proposals will be publicized and identify all evaluation factors and their relative importance. Any response to publicized requests for proposals shall be honored to the maximum extent practical;

(ii) Proposals will be solicited from an adequate number of qualified sources;

(iii) Grantees and subgrantees will have a method for conducting technical evaluations of the proposals received and for selecting awardees;

(iv) Awards will be made to the responsible firm whose proposal is most advantageous to the program, with price and other factors considered; and

(v) Grantees and subgrantees may use competitive proposal procedures for qualifications-based procurement of architectural/engineering (A/E) professional services whereby competitors' qualifications are evaluated and the most qualified competitor is selected, subject to negotiation of fair and reasonable compensation. The method, where price is not used as a selection factor, can only be used in procurement of A/E professional services. It cannot be used to purchase other types of services though A/E firms are a potential source to perform the proposed effort.

(4) Procurement by *noncompetitive proposals* is procurement through solicitation of a proposal from only one source, or after solicitation of a number of sources, competition is determined inadequate.

(i) Procurement by noncompetitive proposals may be used only when the award of a contract is infeasible under small purchase procedures, sealed bids or competitive proposals and one of the following circumstances applies:

(A) The item is available only from a single source;

(B) The public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation;

(C) The awarding agency authorizes noncompetitive proposals; or

(D) After solicitation of a number of sources, competition is determined inadequate.

(ii) Cost analysis, i.e., verifying the proposed cost data, the projections of the data, and the evaluation of the specific elements of costs and profits, is required.

(iii) Grantees and subgrantees may be required to submit the proposed procurement to the awarding agency for pre-award review in accordance with paragraph (g) of this section.

(e) *Contracting with small and minority firms, women's business enterprise and labor surplus area firms.* (1) The grantee and subgrantee will take all necessary affirmative steps to assure that minority firms, women's business enterprises, and labor surplus area firms are used when possible.

(2) Affirmative steps shall include:

(i) Placing qualified small and minority businesses and women's business enterprises on solicitation lists;

(ii) Assuring that small and minority businesses, and women's business enterprises are solicited whenever they are potential sources;

(iii) Dividing total requirements, when economically feasible, into smaller tasks or quantities to permit maximum participation by small and minority business, and women's business enterprises;

(iv) Establishing delivery schedules, where the requirement permits, which encourage participation by small and minority business, and women's business enterprises;

(v) Using the services and assistance of the Small Business Administration, and the Minority Business Development Agency of the Department of Commerce; and

(vi) Requiring the prime contractor, if subcontracts are to be let, to take the affirmative steps listed in paragraphs (e)(2) (i) through (v) of this section.

(f) *Contract cost and price.* (1) Grantees and subgrantees must perform a cost or price analysis in connection with every procurement action including contract modifications. The method and degree of analysis is dependent on the facts surrounding the particular procurement situation, but as a starting point, grantees must make independent estimates before receiving bids or proposals. A cost analysis must be performed when the offeror is required to submit the elements of his estimated cost, e.g., under professional, consulting, and architectural engineering services contracts. A cost analysis will be necessary when adequate price competition is lacking, and for sole source procurements, including contract modifications or change orders, unless price resonableness can be established on the basis of a catalog or market price of a commercial product sold in substantial quantities to the general public or based on prices set by law or regulation. A price analysis will be used in all other instances to determine the reasonableness of the proposed contract price.

(2) Grantees and subgrantees will negotiate profit as a separate element of the price for each contract in which there is no price competition and in all cases where cost analysis is performed. To establish a fair and reasonable profit, consideration will be given to the complexity of the work to be performed, the risk borne by the contractor, the contractor's investment, the amount of subcontracting, the quality of its record of past performance, and industry profit rates in the surrounding geographical area for similar work.

(3) Costs or prices based on estimated costs for contracts under grants will be allowable only to the extent that costs incurred or cost estimates included in negotiated prices are consistent with Federal cost principles (see § 24.22). Grantees may reference their own cost principles that comply with the applicable Federal cost principles.

(4) The cost plus a percentage of cost and percentage of construction cost methods of contracting shall not be used.

(g) *Awarding agency review.* (1) Grantees and subgrantees must make available, upon request of the awarding agency, technical specifications on proposed procurements where the awarding agency believes such review is needed to ensure that the item and/or service specified is the one being proposed for purchase. This review generally will take place prior to the time the specification is incorporated into a solicitation document. However, if the

grantee or subgrantee desires to have the review accomplished after a solicitation has been developed, the awarding agency may still review the specifications, with such review usually limited to the technical aspects of the proposed purchase.

(2) Grantees and subgrantees must on request make available for awarding agency pre-award review procurement documents, such as requests for proposals or invitations for bids, independent cost estimates, etc. when:

(i) A grantee's or subgrantee's procurement procedures or operation fails to comply with the procurement standards in this section; or

(ii) The procurement is expected to exceed the simplified acquisition threshold and is to be awarded without competition or only one bid or offer is received in response to a solicitation; or

(iii) The procurement, which is expected to exceed the simplified acquisition threshold, specifies a ''brand name'' product; or

(iv) The proposed award is more than the simplified acquisition threshold and is to be awarded to other than the apparent low bidder under a sealed bid procurement; or

(v) A proposed contract modification changes the scope of a contract or increases the contract amount by more than the simplified acquisition threshold.

(3) A grantee or subgrantee will be exempt from the pre-award review in paragraph (g)(2) of this section if the awarding agency determines that its procurement systems comply with the standards of this section.

(i) A grantee or subgrantee may request that its procurement system be reviewed by the awarding agency to determine whether its system meets these standards in order for its system to be certified. Generally, these reviews shall occur where there is a continuous high-dollar funding, and third-party contracts are awarded on a regular basis.

(ii) A grantee or subgrantee may self-certify its procurement system. Such self-certification shall not limit the awarding agency's right to survey the system. Under a self-certification procedure, awarding agencies may wish to rely on written assurances from the grantee or subgrantee that it is complying with these standards. A grantee or subgrantee will cite specific procedures, regulations, standards, etc., as being in compliance with these requirements and have its system available for review.

(h) *Bonding requirements.* For construction or facility improvement contracts or subcontracts exceeding the simplified acquisition threshold, the awarding agency may accept the bonding policy and requirements of the grantee or subgrantee provided the awarding agency has made a determination that the awarding agency's interest is adequately protected. If such a determination has not been made, the minimum requirements shall be as follows:

(1) *A bid guarantee from each bidder equivalent to five percent of the bid price.* The ''bid guarantee'' shall consist of a firm commitment such as a bid bond, certified check, or other negotiable instrument accompanying a bid as assurance that the bidder will, upon acceptance of his bid, execute such contractual documents as may be required within the time specified.

(2) *A performance bond on the part of the contractor for 100 percent of the contract price.* A ''performance bond'' is one executed in connection with a contract to secure fulfillment of all the contractor's obligations under such contract.

(3) *A payment bond on the part of the contractor for 100 percent of the contract price.* A ''payment bond'' is one executed in connection with a contract to assure payment as required by law of all persons supplying labor and material in the execution of the work provided for in the contract.

(i) *Contract provisions.* A grantee's and subgrantee's contracts must contain provisions in paragraph (i) of this section. Federal agencies are permitted to require changes, remedies, changed conditions, access and records retention, suspension of work, and other clauses approved by the Office of Federal Procurement Policy.

(1) Administrative, contractual, or legal remedies in instances where contractors violate or breach contract terms, and provide for such sanctions

and penalties as may be appropriate. (Contracts more than the simplified acquisition threshold)

(2) Termination for cause and for convenience by the grantee or subgrantee including the manner by which it will be effected and the basis for settlement. (All contracts in excess of $10,000)

(3) Compliance with Executive Order 11246 of September 24, 1965, entitled ''Equal Employment Opportunity,'' as amended by Executive Order 11375 of October 13, 1967, and as supplemented in Department of Labor regulations (41 CFR chapter 60). (All construction contracts awarded in excess of $10,000 by grantees and their contractors or subgrantees)

(4) Compliance with the Copeland ''Anti-Kickback'' Act (18 U.S.C. 874) as supplemented in Department of Labor regulations (29 CFR Part 3). (All contracts and subgrants for construction or repair)

(5) Compliance with the Davis-Bacon Act (40 U.S.C. 276a to 276a–7) as supplemented by Department of Labor regulations (29 CFR Part 5). (Construction contracts in excess of $2000 awarded by grantees and subgrantees when required by Federal grant program legislation)

(6) Compliance with Sections 103 and 107 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 327–330) as supplemented by Department of Labor regulations (29 CFR Part 5). (Construction contracts awarded by grantees and subgrantees in excess of $2000, and in excess of $2500 for other contracts which involve the employment of mechanics or laborers)

(7) Notice of awarding agency requirements and regulations pertaining to reporting.

(8) Notice of awarding agency requirements and regulations pertaining to patent rights with respect to any discovery or invention which arises or is developed in the course of or under such contract.

(9) Awarding agency requirements and regulations pertaining to copyrights and rights in data.

(10) Access by the grantee, the subgrantee, the Federal grantor agency, the Comptroller General of the United States, or any of their duly authorized representatives to any books, documents, papers, and records of the contractor which are directly pertinent to that specific contract for the purpose of making audit, examination, excerpts, and transcriptions.

(11) Retention of all required records for three years after grantees or subgrantees make final payments and all other pending matters are closed.

(12) Compliance with all applicable standards, orders, or requirements issued under section 306 of the Clean Air Act (42 U.S.C. 1857(h)), section 508 of the Clean Water Act (33 U.S.C. 1368), Executive Order 11738, and Environmental Protection Agency regulations (40 CFR part 15). (Contracts, subcontracts, and subgrants of amounts in excess of $100,000).

(13) Mandatory standards and policies relating to energy efficiency which are contained in the state energy conservation plan issued in compliance with the Energy Policy and Conservation Act (Pub. L. 94–163, 89 Stat. 871).

[53 FR 8048, 8087, Mar. 11, 1988, as amended at 60 FR 19639, 19642, Apr. 19, 1995]

§ 24.37 Subgrants.

(a) *States.* States shall follow state law and procedures when awarding and administering subgrants (whether on a cost reimbursement or fixed amount basis) of financial assistance to local and Indian tribal governments. States shall:

(1) Ensure that every subgrant includes any clauses required by Federal statute and executive orders and their implementing regulations;

(2) Ensure that subgrantees are aware of requirements imposed upon them by Federal statute and regulation;

(3) Ensure that a provision for compliance with § 24.42 is placed in every cost reimbursement subgrant; and

(4) Conform any advances of grant funds to subgrantees substantially to the same standards of timing and amount that apply to cash advances by Federal agencies.

(b) *All other grantees.* All other grantees shall follow the provisions of this part which are applicable to awarding agencies when awarding and administering subgrants (whether on a cost reimbursement or fixed amount basis)

of financial assistance to local and Indian tribal governments. Grantees shall:

(1) Ensure that every subgrant includes a provision for compliance with this part;

(2) Ensure that every subgrant includes any clauses required by Federal statute and executive orders and their implementing regulations; and

(3) Ensure that subgrantees are aware of requirements imposed upon them by Federal statutes and regulations.

(c) *Exceptions.* By their own terms, certain provisions of this part do not apply to the award and administration of subgrants:

(1) Section 24.10;

(2) Section 24.11;

(3) The letter-of-credit procedures specified in Treasury Regulations at 31 CFR Part 205, cited in §24.21; and

(4) Section 24.50.

REPORTS, RECORDS, RETENTION, AND ENFORCEMENT

§24.40 Monitoring and reporting program performance.

(a) *Monitoring by grantees.* Grantees are responsible for managing the day-to-day operations of grant and subgrant supported activities. Grantees must monitor grant and subgrant supported activities to assure compliance with applicable Federal requirements and that performance goals are being achieved. Grantee monitoring must cover each program, function or activity.

(b) *Nonconstruction performance reports.* The Federal agency may, if it decides that performance information available from subsequent applications contains sufficient information to meet its programmatic needs, require the grantee to submit a performance report only upon expiration or termination of grant support. Unless waived by the Federal agency this report will be due on the same date as the final Financial Status Report.

(1) Grantees shall submit annual performance reports unless the awarding agency requires quarterly or semi-annual reports. However, performance reports will not be required more frequently than quarterly. Annual reports shall be due 90 days after the grant year, quarterly or semi-annual reports shall be due 30 days after the reporting period. The final performance report will be due 90 days after the expiration or termination of grant support. If a justified request is submitted by a grantee, the Federal agency may extend the due date for any performance report. Additionally, requirements for unnecessary performance reports may be waived by the Federal agency.

(2) Performance reports will contain, for each grant, brief information on the following:

(i) A comparison of actual accomplishments to the objectives established for the period. Where the output of the project can be quantified, a computation of the cost per unit of output may be required if that information will be useful.

(ii) The reasons for slippage if established objectives were not met.

(iii) Additional pertinent information including, when appropriate, analysis and explanation of cost overruns or high unit costs.

(3) Grantees will not be required to submit more than the original and two copies of performance reports.

(4) Grantees will adhere to the standards in this section in prescribing performance reporting requirements for subgrantees.

(c) *Construction performance reports.* For the most part, on-site technical inspections and certified percentage-of-completion data are relied on heavily by Federal agencies to monitor progress under construction grants and subgrants. The Federal agency will require additional formal performance reports only when considered necessary, and never more frequently than quarterly.

(d) *Significant developments.* Events may occur between the scheduled performance reporting dates which have significant impact upon the grant or subgrant supported activity. In such cases, the grantee must inform the Federal agency as soon as the following types of conditions become known:

(1) Problems, delays, or adverse conditions which will materially impair the ability to meet the objective of the award. This disclosure must include a

statement of the action taken, or contemplated, and any assistance needed to resolve the situation.

(2) Favorable developments which enable meeting time schedules and objectives sooner or at less cost than anticipated or producing more beneficial results than originally planned.

(e) Federal agencies may make site visits as warranted by program needs.

(f) *Waivers, extensions.* (1) Federal agencies may waive any performance report required by this part if not needed.

(2) The grantee may waive any performance report from a subgrantee when not needed. The grantee may extend the due date for any performance report from a subgrantee if the grantee will still be able to meet its performance reporting obligations to the Federal agency.

§ 24.41 Financial reporting.

(a) *General.* (1) Except as provided in paragraphs (a) (2) and (5) of this section, grantees will use only the forms specified in paragraphs (a) through (e) of this section, and such supplementary or other forms as may from time to time be authorized by OMB, for:

(i) Submitting financial reports to Federal agencies, or

(ii) Requesting advances or reimbursements when letters of credit are not used.

(2) Grantees need not apply the forms prescribed in this section in dealing with their subgrantees. However, grantees shall not impose more burdensome requirements on subgrantees.

(3) Grantees shall follow all applicable standard and supplemental Federal agency instructions approved by OMB to the extend required under the Paperwork Reduction Act of 1980 for use in connection with forms specified in paragraphs (b) through (e) of this section. Federal agencies may issue substantive supplementary instructions only with the approval of OMB. Federal agencies may shade out or instruct the grantee to disregard any line item that the Federal agency finds unnecessary for its decisionmaking purposes.

(4) Grantees will not be required to submit more than the original and two copies of forms required under this part.

(5) Federal agencies may provide computer outputs to grantees to expedite or contribute to the accuracy of reporting. Federal agencies may accept the required information from grantees in machine usable format or computer printouts instead of prescribed forms.

(6) Federal agencies may waive any report required by this section if not needed.

(7) Federal agencies may extend the due date of any financial report upon receiving a justified request from a grantee.

(b) *Financial Status Report*—(1) *Form.* Grantees will use Standard Form 269 or 269A, Financial Status Report, to report the status of funds for all nonconstruction grants and for construction grants when required in accordance with § 24.41(e)(2)(iii) of this section.

(2) *Accounting basis.* Each grantee will report program outlays and program income on a cash or accrual basis as prescribed by the awarding agency. If the Federal agency requires accrual information and the grantee's accounting records are not normally kept on the accural basis, the grantee shall not be required to convert its accounting system but shall develop such accrual information through and analysis of the documentation on hand.

(3) *Frequency.* The Federal agency may prescribe the frequency of the report for each project or program. However, the report will not be required more frequently than quarterly. If the Federal agency does not specify the frequency of the report, it will be submitted annually. A final report will be required upon expiration or termination of grant support.

(4) *Due date.* When reports are required on a quarterly or semiannual basis, they will be due 30 days after the reporting period. When required on an annual basis, they will be due 90 days after the grant year. Final reports will be due 90 days after the expiration or termination of grant support.

(c) *Federal Cash Transactions Report*—(1) *Form.* (i) For grants paid by letter or credit, Treasury check advances or electronic transfer of funds, the grantee will submit the Standard Form 272,

Federal Cash Transactions Report, and when necessary, its continuation sheet, Standard Form 272a, unless the terms of the award exempt the grantee from this requirement.

(ii) These reports will be used by the Federal agency to monitor cash advanced to grantees and to obtain disbursement or outlay information for each grant from grantees. The format of the report may be adapted as appropriate when reporting is to be accomplished with the assistance of automatic data processing equipment provided that the information to be submitted is not changed in substance.

(2) *Forecasts of Federal cash requirements.* Forecasts of Federal cash requirements may be required in the ''Remarks'' section of the report.

(3) *Cash in hands of subgrantees.* When considered necessary and feasible by the Federal agency, grantees may be required to report the amount of cash advances in excess of three days' needs in the hands of their subgrantees or contractors and to provide short narrative explanations of actions taken by the grantee to reduce the excess balances.

(4) *Frequency and due date.* Grantees must submit the report no later than 15 working days following the end of each quarter. However, where an advance either by letter of credit or electronic transfer of funds is authorized at an annualized rate of one million dollars or more, the Federal agency may require the report to be submitted within 15 working days following the end of each month.

(d) *Request for advance or reimbursement*—(1) *Advance payments.* Requests for Treasury check advance payments will be submitted on Standard Form 270, Request for Advance or Reimbursement. (This form will not be used for drawdowns under a letter of credit, electronic funds transfer or when Treasury check advance payments are made to the grantee automatically on a predetermined basis.)

(2) *Reimbursements.* Requests for reimbursement under nonconstruction grants will also be submitted on Standard Form 270. (For reimbursement requests under construction grants, see paragraph (e)(1) of this section.)

(3) The frequency for submitting payment requests is treated in §24.41(b)(3).

(e) *Outlay report and request for reimbursement for construction programs.* (1) Grants that support construction activities paid by reimbursement method.

(i) Requests for reimbursement under construction grants will be submitted on Standard Form 271, Outlay Report and Request for Reimbursement for Construction Programs. Federal agencies may, however, prescribe the Request for Advance or Reimbursement form, specified in §24.41(d), instead of this form.

(ii) The frequency for submitting reimbursement requests is treated in §24.41(b)(3).

(2) Grants that support construction activities paid by letter of credit, electronic funds transfer or Treasury check advance.

(i) When a construction grant is paid by letter of credit, electronic funds transfer or Treasury check advances, the grantee will report its outlays to the Federal agency using Standard Form 271, Outlay Report and Request for Reimbursement for Construction Programs. The Federal agency will provide any necessary special instruction. However, frequency and due date shall be governed by §24.41(b) (3) and (4).

(ii) When a construction grant is paid by Treasury check advances based on periodic requests from the grantee, the advances will be requested on the form specified in §24.41(d).

(iii) The Federal agency may substitute the Financial Status Report specified in §24.41(b) for the Outlay Report and Request for Reimbursement for Construction Programs.

(3) *Accounting basis.* The accounting basis for the Outlay Report and Request for Reimbursement for Construction Programs shall be governed by §24.41(b)(2).

§24.42 Retention and access requirements for records.

(a) *Applicability.* (1) This section applies to all financial and programmatic records, supporting documents, statistical records, and other records of grantees or subgrantees which are:

(i) Required to be maintained by the terms of this part, program regulations or the grant agreement, or

(ii) Otherwise reasonably considered as pertinent to program regulations or the grant agreement.

(2) This section does not apply to records maintained by contractors or subcontractors. For a requirement to place a provision concerning records in certain kinds of contracts, see § 24.36(i)(10).

(b) *Length of retention period.* (1) Except as otherwise provided, records must be retained for three years from the starting date specified in paragraph (c) of this section.

(2) If any litigation, claim, negotiation, audit or other action involving the records has been started before the expiration of the 3-year period, the records must be retained until completion of the action and resolution of all issues which arise from it, or until the end of the regular 3-year period, whichever is later.

(3) To avoid duplicate recordkeeping, awarding agencies may make special arrangements with grantees and subgrantees to retain any records which are continuously needed for joint use. The awarding agency will request transfer of records to its custody when it determines that the records possess long-term retention value. When the records are transferred to or maintained by the Federal agency, the 3-year retention requirement is not applicable to the grantee or subgrantee.

(c) *Starting date of retention period*—(1) *General.* When grant support is continued or renewed at annual or other intervals, the retention period for the records of each funding period starts on the day the grantee or subgrantee submits to the awarding agency its single or last expenditure report for that period. However, if grant support is continued or renewed quarterly, the retention period for each year's records starts on the day the grantee submits its expenditure report for the last quarter of the Federal fiscal year. In all other cases, the retention period starts on the day the grantee submits its final expenditure report. If an expenditure report has been waived, the retention period starts on the day the report would have been due.

(2) *Real property and equipment records.* The retention period for real property and equipment records starts from the date of the disposition or replacement or transfer at the direction of the awarding agency.

(3) *Records for income transactions after grant or subgrant support.* In some cases grantees must report income after the period of grant support. Where there is such a requirement, the retention period for the records pertaining to the earning of the income starts from the end of the grantee's fiscal year in which the income is earned.

(4) *Indirect cost rate proposals, cost allocations plans, etc.* This paragraph applies to the following types of documents, and their supporting records: indirect cost rate computations or proposals, cost allocation plans, and any similar accounting computations of the rate at which a particular group of costs is chargeable (such as computer usage chargeback rates or composite fringe benefit rates).

(i) *If submitted for negotiation.* If the proposal, plan, or other computation is required to be submitted to the Federal Government (or to the grantee) to form the basis for negotiation of the rate, then the 3-year retention period for its supporting records starts from the date of such submission.

(ii) *If not submitted for negotiation.* If the proposal, plan, or other computation is not required to be submitted to the Federal Government (or to the grantee) for negotiation purposes, then the 3-year retention period for the proposal plan, or computation and its supporting records starts from end of the fiscal year (or other accounting period) covered by the proposal, plan, or other computation.

(d) *Substitution of microfilm.* Copies made by microfilming, photocopying, or similar methods may be substituted for the original records.

(e) *Access to records*—(1) *Records of grantees and subgrantees.* The awarding agency and the Comptroller General of the United States, or any of their authorized representatives, shall have the right of access to any pertinent books, documents, papers, or other records of grantees and subgrantees which are pertinent to the grant, in order to

make audits, examinations, excerpts, and transcripts.

(2) *Expiration of right of access.* The rights of access in this section must not be limited to the required retention period but shall last as long as the records are retained.

(f) *Restrictions on public access.* The Federal Freedom of Information Act (5 U.S.C. 552) does not apply to records unless required by Federal, State, or local law, grantees and subgrantees are not required to permit public access to their records.

§24.43 Enforcement.

(a) *Remedies for noncompliance.* If a grantee or subgrantee materially fails to comply with any term of an award, whether stated in a Federal statute or regulation, an assurance, in a State plan or application, a notice of award, or elsewhere, the awarding agency may take one or more of the following actions, as appropriate in the circumstances:

(1) Temporarily withhold cash payments pending correction of the deficiency by the grantee or subgrantee or more severe enforcement action by the awarding agency,

(2) Disallow (that is, deny both use of funds and matching credit for) all or part of the cost of the activity or action not in compliance,

(3) Wholly or partly suspend or terminate the current award for the grantee's or subgrantee's program,

(4) Withhold further awards for the program, or

(5) Take other remedies that may be legally available.

(b) *Hearings, appeals.* In taking an enforcement action, the awarding agency will provide the grantee or subgrantee an opportunity for such hearing, appeal, or other administrative proceeding to which the grantee or subgrantee is entitled under any statute or regulation applicable to the action involved.

(c) *Effects of suspension and termination.* Costs of grantee or subgrantee resulting from obligations incurred by the grantee or subgrantee during a suspension or after termination of an award are not allowable unless the awarding agency expressly authorizes them in the notice of suspension or termination or subsequently. Other grantee or subgrantee costs during suspension or after termination which are necessary and not reasonably avoidable are allowable if:

(1) The costs result from obligations which were properly incurred by the grantee or subgrantee before the effective date of suspension or termination, are not in anticipation of it, and, in the case of a termination, are noncancellable, and,

(2) The costs would be allowable if the award were not suspended or expired normally at the end of the funding period in which the termination takes effect.

(d) *Relationship to debarment and suspension.* The enforcement remedies identified in this section, including suspension and termination, do not preclude grantee or subgrantee from being subject to ''Debarment and Suspension'' under E.O. 12549 (see §24.35).

§24.44 Termination for convenience.

Except as provided in §24.43 awards may be terminated in whole or in part only as follows:

(a) By the awarding agency with the consent of the grantee or subgrantee in which case the two parties shall agree upon the termination conditions, including the effective date and in the case of partial termination, the portion to be terminated, or

(b) By the grantee or subgrantee upon written notification to the awarding agency, setting forth the reasons for such termination, the effective date, and in the case of partial termination, the portion to be terminated. However, if, in the case of a partial termination, the awarding agency determines that the remaining portion of the award will not accomplish the purposes for which the award was made, the awarding agency may terminate the award in its entirety under either §24.43 or paragraph (a) of this section.

Subpart D—After-The-Grant Requirements

§24.50 Closeout.

(a) *General.* The Federal agency will close out the award when it determines that all applicable administrative actions and all required work of the grant has been completed.

(b) *Reports.* Within 90 days after the expiration or termination of the grant, the grantee must submit all financial, performance, and other reports required as a condition of the grant. Upon request by the grantee, Federal agencies may extend this timeframe. These may include but are not limited to:

(1) *Final performance or progress report.*

(2) *Financial Status Report (SF 269) or Outlay Report and Request for Reimbursement for Construction Programs (SF–271) (as applicable).*

(3) *Final request for payment (SF–270) (if applicable).*

(4) *Invention disclosure (if applicable).*

(5) *Federally-owned property report:*

In accordance with § 24.32(f), a grantee must submit an inventory of all federally owned property (as distinct from property acquired with grant funds) for which it is accountable and request disposition instructions from the Federal agency of property no longer needed.

(c) *Cost adjustment.* The Federal agency will, within 90 days after receipt of reports in paragraph (b) of this section, make upward or downward adjustments to the allowable costs.

(d) *Cash adjustments.* (1) The Federal agency will make prompt payment to the grantee for allowable reimbursable costs.

(2) The grantee must immediately refund to the Federal agency any balance of unobligated (unencumbered) cash advanced that is not authorized to be retained for use on other grants.

§ 24.51 Later disallowances and adjustments.

The closeout of a grant does not affect:

(a) The Federal agency's right to disallow costs and recover funds on the basis of a later audit or other review;

(b) The grantee's obligation to return any funds due as a result of later refunds, corrections, or other transactions;

(c) Records retention as required in § 24.42;

(d) Property management requirements in §§ 24.31 and 24.32; and

(e) Audit requirements in § 24.26.

§ 24.52 Collection of amounts due.

(a) Any funds paid to a grantee in excess of the amount to which the grantee is finally determined to be entitled under the terms of the award constitute a debt to the Federal Government. If not paid within a reasonable period after demand, the Federal agency may reduce the debt by:

(1) Making an adminstrative offset against other requests for reimbursements,

(2) Withholding advance payments otherwise due to the grantee, or

(3) Other action permitted by law.

(b) Except where otherwise provided by statutes or regulations, the Federal agency will charge interest on an overdue debt in accordance with the Federal Claims Collection Standards (4 CFR Chapter II). The date from which interest is computed is not extended by litigation or the filing of any form of appeal.

Subpart E—Entitlements [Reserved]

PART 25—PROGRAM

FRAUD CIVIL REMEDIES

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25.47 Limitations.

AUTHORITY: Secs. 6101–6104, Pub. L. 99–509, 100 Stat. 1874 (31 U.S.C. 3801–3812); Sec. 4, as amended, and sec. 5, Pub. L. 101–410, 104 Stat. 890 (28 U.S.C. 2461 note); Pub. L. 104–134, 110 Stat. 1321, 28 U.S.C. 2461 note.

SOURCE: 55 FR 47854, Nov. 16, 1990, unless otherwise noted.

FRAUD CIVIL REMEDIES

§25.1 Basis and purpose.

(a) *Basis.* This part implements the Program Fraud Civil Remedies Act of 1986, Public Law 99–509, section 6101–6104, 100 Stat. 1874 (October 21, 1986), to be codified at 31 U.S.C. 3801–3812. 31 U.S.C. 3809 of the statute requires each authority head to promulgate regulations necessary to implement the provisions of the statute.

(b) *Purpose.* This part (1) establishes administrative procedures for imposing civil penalties and assessments against persons who make, submit, or present, or cause to be made, submitted, or presented, false, fictitious, or fraudulent claims or written statements to authorities or to their agents, and (2) specifies the hearing and appeal rights of persons subject to allegations of liability for such penalties and assessments.

§25.2 Definitions.

ALJ means an Administrative Law Judge in the authority appointed pursuant to 5 U.S.C. 3105 or detailed to the authority pursuant to 5 U.S.C. 3344.

Authority means the Department of Commerce.

Authority head means the Secretary of the Department of Commerce, or designee.

Benefit means, except as the context otherwise requires, anything of value, including but not limited to any advantage, preference, privilege, license, permit, favorable decision, ruling, status, or loan guarantee.

Claim means any request, demand, or submission—

(a) Made to the authority for property, services, or money (including money representing grants, loans, insurance, or benefits);

(b) Made to a recipient of property, services, or money from the authority or to a party to a contract with the authority—

(1) For property or services if the United States—

(i) Provided such property or services;

(ii) Provided any portion of the funds for the purchase of such property or services; or

(iii) Will reimburse such recipient or party for the purchase of such property or services; or

(2) For the payment of money (including money representing grants, loans, insurance, or benefits) if the United States—

(i) Provided any portion of the money requested or demanded; or

(ii) Will reimburse such recipient or party for any portion of the money paid on such request or demand; or

(c) Made to the authority which has the effect of decreasing an obligation to pay or account for property, services, or money.

Complaint means the administrative complaint served by the reviewing official on the respondent under §25.7.

Department means the Department of Commerce.

Government means the United States Government.

Individual means a natural person.

Initial decision means the written decision of the ALJ required by §§25.10 or 25.37, and includes a revised initial decision issued following a remand or a motion for reconsideration.

Investigating official means the Inspector General of the Department of Commerce or an officer or employee of the Office of the Inspector General designated by the Inspector General and serving in a position for which the rate of basic pay is not less than the minimum rate of basic pay for grade GS–16 under the General Schedule.

Knows or has reason to know, means that a person, with respect to a claim or statement—

(a) Has actual knowledge that the claim or statement is false, fictitious, or fraudulent;

(b) Acts in deliberative ignorance of the truth or falsity of the claim or statement; or

(c) Acts in reckless disregard of the truth or falsity of the claim or statement.

Makes, wherever it appears, shall include the terms presents, submits, and causes to be made, presented, or submitted. As the context requires, *making* or *made,* shall likewise include the corresponding forms of such terms.

Person means any individual, partnership, corporation, association, or private organization and includes the plural of that term.

Representative means any attorney who is a member in good standing of the bar of any State, Territory, or possession of the United States or of the District of Columbia or the Commonwealth of Puerto Rico.

Respondent means any person alleged in a complaint under § 25.7 to be liable for a civil penalty or assessment under § 25.3.

Reviewing official means the General Counsel of the Department or his or her designee who is serving in a position for which the rate of basic pay is not less than the minimum rate of basic pay for grade GS–16 under the General Schedule.

Statement means any representation, certification, affirmation, document, record, or accounting or bookkeeping entry made—

(a) With respect to a claim or to obtain the approval or payment of a claim (including relating to eligibility to make a claim); or

(b) With respect to (including relating to eligibility for)—

(1) A contract with, or a bid or proposal for a contract with; or

(2) A grant, loan, or benefit from,

the authority, or any State, political subdivision of a State, or other party, if the United States Government provides any portion of the money or property under such contract or for such grant, loan, or benefit, or if the Government will reimburse such State, political subdivision, or party for any portion of the money or property under such contract or for such grant, loan, or benefit.

§ 25.3 Basis for civil penalties and assessments.

(a) *Claims.*

(1) Any person who makes a claim that the person knows or has reason to know—

(i) Is false, fictitious, or fraudulent;

(ii) Includes, or is supported by, any written statement which asserts a material fact which is false, fictitious, or fraudulent;

(iii) Includes, or is supported by, any written statement that—

(A) Omits a material fact;

(B) Is false, fictitious, or fraudulent as a result of such omission; and

(C) Is a statement in which the person making such statement has a duty to include such material fact; or

(iv) Is for payment for the provision of property or services which the person has not provided as claimed, shall be subject, in addition to any other remedy that may be prescribed by law, to a civil penalty of not more than $5,000 for each such claim made on or before October 23, 1996, and of not more than $5,500 for each such claim made after October 23, 1996.

(2) Each voucher, invoice, claim form, or other individual request or demand for property, services, or money constitutes a separate claim.

(3) A claim shall be considered made to the authority, recipient, or party when such claim is actually made to an agent, fiscal intermediary, or other entity, including any State or political subdivision thereof, acting for or on behalf of the authority, recipient, or party.

(4) Each claim for property, services, or money is subject to a civil penalty regardless of whether such property,

services, or money is actually delivered or paid.

(5) If the Government has made payment (including transferred property or provided services) or a claim, a person subject to a civil penalty under paragraph (a)(1) of this section shall also be subject to an assessment of not more than twice the amount of such claim or that portion thereof that is determined to be in violation of paragraph (a)(1) of the section. Such assessment shall be in lieu of damages sustained by the Government because of such claim.

(b) *Statements.* (1) Any person who makes a written statement that—

(i) The person knows or has reason to know—

(A) Asserts a material fact which is false, fictitious, or fraudulent; or

(B) Is false, fictitious, or fraudulent because it omits a material fact that the person making the statement has a duty to include in such statement; and

(ii) Contains, or is accompanied by, an express certification or affirmation of the truthfulness and accuracy of the contents of the statement, shall be subject, in addition to any other remedy that may be prescribed by law, to a civil penalty of not more than $5,000 for each such statement made on or before October 23, 1996, and of not more than $5,500 for each such statement made after October 23, 1996.

(2) Each written representation, certification, or affirmation constitutes a separate statement.

(3) A statement shall be considered made to the authority when such statement is actually made to an agent, fiscal intermediary, or other entity, including any State or political subdivision thereof, acting for or on behalf of the authority.

(c) No proof of specific intent to defraud is required to establish liability under this section.

(d) In any case in which it is determined that more than one person is liable for making a claim or statement under this section, each such person may be held liable for a civil penalty.

(e) In any case in which it is determined that more than one person is liable for making a claim under this section on which the Government has made payment (including transferred property or provide services), an assessment may be imposed against any such person or jointly and severally against any combination of such persons.

[55 FR 47854, Nov. 16, 1990, as amended at 61 FR 55094, Oct. 24, 1996]

§25.4 Investigation.

(a) If an investigating official concludes that a subpoena pursuant to the authority conferred by 31 U.S.C. 3804(a) is warranted—

(1) The subpoena so issued shall notify the person to whom it is addressed of the authority under which the subpoena is issued and shall identify the records or documents sought;

(2) The investigating official may designate a person to act on his or her behalf to receive the documents sought; and

(3) The person receiving such subpoena shall be required to tender to the investigating official, or the person designated to receive the documents, a certification that—

(i) The documents sought have been produced;

(ii) Such documents are not available and the reasons therefore; or

(iii) Such documents, suitably identified, have been withheld based upon the assertion of an identified privilege.

(b) If the investigating official concludes that an action under the Program Fraud Civil Remedies Act may be warranted, the investigating official shall submit a report containing the findings and conclusions of such investigation to the reviewing official.

(c) Nothing in this section shall preclude or limit an investigating official's discretion to refer allegations directly to the Department of Justice for suit under the False Claims Act or other civil relief, or to defer or postpone a report or referral to avoid interference with a criminal investigation or prosecution.

(d) Nothing in this section modifies any responsibility of an investigating official to report violations of criminal law to the Attorney General.

§25.5 Review by the reviewing official.

(a) If, based on the report of the investigating official under §25.4(b), the reviewing official determines that

there is adequate evidence to believe that a person is liable under § 25.3, the reviewing official shall transmit to the Attorney General a written notice of the reviewing official's intention to issue a complaint under § 25.7.

(b) Such notice shall include—

(1) A statement of the reviewing official's reasons for issuing a complaint;

(2) A statement specifying the evidence that supports the allegations of liability;

(3) A description of the claims or statements upon which the allegations of liability are based;

(4) An estimate of the amount of money, or the value of property, services, or other benefits, requested or demanded in violation of § 25.3 of this part;

(5) A statement of any exculpatory or mitigating circumstances that may relate to the claims or statements known by the reviewing official or the investigating official; and

(6) A statement that there is a reasonable prospect of collecting an appropriate amount of penalties and assessments. Such a statement may be based upon information then known or an absence of any information indicating that the person may be unable to pay such an amount.

§ 25.6 Prerequisites for issuing a complaint.

(a) The reviewing official may issue a complaint under § 25.7 only if—

(1) The Department of Justice approved the issuance of a complaint in a written statement described in 31 U.S.C. 3803(b)(1), and

(2) In the case of allegations of liability under § 25.3(a) with respect to a claim, the reviewing official determines that, with respect to such claim or a group of related claims submitted at the same time such claim is submitted (as defined in paragraph (b) of this section), the amount of money, or the value of property or services, demanded or requested in violation of § 25.3(a) does not exceed $150,000.

(b) For the purposes of this section, a related group of claims submitted at the same time shall include only those claims arising from the same transaction (*e.g.*, grant, loan, application, or contract) that are submitted simultaneously as part of a single request, demand, or submission.

(c) Nothing in this section shall be construed to limit the reviewing official's authority to join in a single complaint against a person claims that are unrelated or were not submitted simultaneously, regardless of the amount of money, or the value of property or services, demanded or requested.

§ 25.7 Complaint.

(a) On or after the date the Department of Justice approves the issuance of a complaint in accordance with 31 U.S.C. 3803(b)(1), the reviewing official may serve a complaint on the respondent, as provided in § 25.8.

(b) The complaint shall state—

(1) The allegations of liability against the respondent, including the statutory basis for liability, an identification of the claims or statements that are the basis for the alleged liability, and the reasons why liability allegedly arises from such claims or statements;

(2) The maximum amount of penalties and assessments for which the respondent may be held liable;

(3) Instructions for filing an answer to request a hearing, including a specific statement of the respondent's right to request a hearing by filing an answer and to be represented by a representative; and

(4) That failure to file an answer within 30 days of service of the complaint will result in the imposition of the maximum amount of penalties and assessments without right to appeal.

(c) At the same time the reviewing official serves the complaint, he or she shall serve the respondent with a copy of these regulations.

§ 25.8 Service of complaint.

(a) Service of a complaint must be made by certified or registered mail or by delivery in any manner authorized by Rule 4(d) of the Federal Rules of Civil Procedure.

(b) Proof of service, stating the name and address of the person on whom the complaint was served, and the manner and date of service, may be made by—

(1) Affidavit of the individual making service;

(2) An acknowledged United States Postal Service return receipt card; or

(3) Written acknowledgment of the respondent or his or her representative.

§25.9 Answer.

(a) The respondent may request a hearing by filing an answer with the reviewing official within 30 days of service of the complaint. An answer shall be deemed to be a request for hearing.

(b) In the answer, the respondent—

(1) Shall admit or deny each of the allegations of liability made in the complaint;

(2) Shall state any defense on which the respondent intends to rely;

(3) May state any reasons why the respondent contends that the penalties and assessments should be less than the statutory maximum; and

(4) Shall state the name, address, and telephone number of the person authorized by the respondent to act as respondent's representative, if any.

§25.10 Default upon failure to file an answer.

(a) If the respondent does not file an answer within the time prescribed in §25.9(a), the reviewing official may refer the complaint to the ALJ along with the proof of service, as provided in §25.8(b).

(b) Upon the referral of the complaint, the ALJ shall promptly serve on the respondent in the manner prescribed in §25.8, a notice that an initial decision will be issued under this section.

(c) The ALJ shall assume the facts alleged in the complaint to be true and, if such facts establish liability under §25.3, the ALJ shall issue an initial decision imposing the maximum amount of penalties and assessments allowed under the statute.

(d) Except as otherwise provided in this section, by failing to file a timely answer, the respondent waives any right to further review of the penalties and assessments imposed under paragraph (c) of this section, and the initial decision shall become final binding upon the parties 30 days after it is issued.

(e) If, before such an initial decision becomes final, the respondent files motion with the ALJ seeking to reopen on the grounds that extraordinary circumstances prevented the respondent from filing an answer, the initial decision shall be stayed pending the ALJ's decision on the motion.

(f) If, on such motion, the respondent can demonstrate extraordinary circumstances excusing the failure to file a timely answer, the ALJ shall withdraw the initial decision in paragraph (c) of this section, if such a decision has been issued, and shall grant the respondent an opportunity to answer the complaint.

(g) A decision of the ALJ denying a respondent's motion under paragraph (e) of this section is not subject to reconsideration under §25.38.

(h) The respondent may appeal to the authority head the decision denying a motion to reopen by filing a notice of appeal with the authority head within 15 days after the ALJ denies the motion. The timely filing of a notice of appeal shall stay the initial decision until the authority head decides the issue.

(i) If the respondent files a timely notice of appeal with the authority head, the ALJ shall forward the record of the proceeding to the authority head.

(j) The authority head shall decide expeditiously whether extraordinary circumstances excuse the respondent's failure to file a timely answer based solely on the record before the ALJ.

(k) If the authority head decides that extraordinary circumstances excused the respondent's failure to file a timely answer, the authority head shall remand the case of the ALJ with instructions to grant the respondent an opportunity to answer.

(l) If the authority head decides that the respondent's failure to file a timely answer is not excused, the authority head shall reinstate the initial decision of the ALJ, which shall become final and binding upon the parties 30 days after the authority head issues such decision.

§25.11 Referral of complaint and answer to the ALJ.

Upon receipt of an answer, the reviewing official shall file the complaint and answer with the ALJ.

§ 25.12 Notice of hearing.

(a) When the ALJ receives the complaint and answer, the ALJ shall promptly serve a notice of hearing upon the respondent in the manner prescribed by § 25.8. At the same time, the ALJ shall send a copy of such notice to the representative for the Government.

(b) Such notice shall include—

(1) The tentative time and place, and the nature of the hearing;

(2) The legal authority and jurisdiction under which the hearing is to be held;

(3) The matters of fact and law to be asserted;

(4) A description of the procedures for the conduct of the hearing;

(5) The name, address, and telephone number of the representative of the Government and of the respondent, if any; and

(6) Such other matters as the ALJ deems appropriate.

§ 25.13 Parties to the hearing.

(a) The parties to the hearing shall be the respondent and the authority.

(b) Pursuant to 31 U.S.C. 3730(c)(5), a private plaintiff under the False Claims Act may participate in these proceedings to the extent authorized by the provisions of that Act.

§ 25.14 Separation of functions.

(a) The investigating official, the reviewing official, and any employee or agent of the authority who takes part in investigating, preparing, or presenting a particular case may not, in such case or a factually related case—

(1) Participate in the hearing as the ALJ;

(2) Participate or advise in the initial decision or the review of the initial decision by the authority head, except as a witness or a representative in public proceedings; or

(3) Make the collection of penalties and assessments under 31 U.S.C. 3806.

(b) The ALJ shall not be responsible to, or subject to the supervision or direction of, the investigating official or the reviewing official.

(c) The reviewing official shall, after consulting with the Inspector General, designate the representative for the Government, who shall be an attorney with either the Office of General Counsel or the Office of the Inspector General. The reviewing official's decision is final.

§ 25.15 Ex parte contacts.

No party or person (except employees of the ALJ's office) shall communicate in any way with the ALJ on any matter at issue in a case, unless on notice and opportunity for all parties to participate. This provision does not prohibit a person or party from inquiring about the status of a case or asking routine questions concerning administrative functions or procedures.

§ 25.16 Disqualification of reviewing official or ALJ.

(a) A reviewing official or ALJ in a particular case may disqualify himself or herself at any time.

(b) A party may file with the ALJ a motion for disqualification of a reviewing official or an ALJ. Such motion shall be accompanied by an affidavit alleging personal bias or other reason for disqualification.

(c) Such motion and affidavit shall be filed promptly upon the party's discovery of reasons requiring disqualification, or such objections shall be deemed waived.

(d) Such affidavit shall state specific facts that support the party's belief that personal bias or other reason for disqualification exists and the time and circumstances of the party's discovery of such facts. It shall be accompanied by a certificate of the representative of record that it is made in good faith.

(e) Upon the filing of such a motion and affidavit, the ALJ shall proceed no further in the case until he or she resolves the matter of disqualification in accordance with paragraph (f) of this section.

(f)(1) If the ALJ determines that a reviewing official is disqualified, the ALJ shall dismiss the complaint without prejudice.

(2) If the ALJ disqualifies himself or herself, the case shall be reassigned promptly to another ALJ.

(3) If the ALJ denies a motion to disqualify, the authority head may determine the matter only as part of his or her review of the initial decision upon appeal, if any.

§25.17 Rights of parties.

Except as otherwise limited by this part, all parties may—

(a) Be accompanied, represented, and advised by a representative;

(b) Participate in any conference held by the ALJ;

(c) Conduct discovery;

(d) Agree to stipulations of fact or law, which shall be made part of the record;

(e) Present evidence relevant to the issues at the hearing;

(f) Present and cross-examine witnesses;

(g) Present oral arguments at the hearing as permitted by the ALJ; and

(h) Submit written briefs and proposed findings of fact and conclusions of law after the hearing.

§25.18 Authority of the ALJ.

(a) The ALJ shall conduct a fair and impartial hearing, avoid delay, maintain order, and assure that a record of the proceeding is made.

(b) The ALJ has the authority to—

(1) Set and change the date, time, and place of the hearing upon reasonable notice to the parties;

(2) Continue or recess the hearing in whole or in part for a reasonable period of time;

(3) Hold conferences to identify or simplify the issues, or to consider other matters that may aid in the expeditious disposition of the proceeding;

(4) Administer oaths and affirmations;

(5) Issue subpoenas requiring the attendance of witnesses and the production of documents at depositions or at hearings;

(6) Rule on motions and other procedural matters;

(7) Regulate the scope and timing of discovery;

(8) Regulate the course of the hearing and the conduct of representatives and parties;

(9) Examine witnesses;

(10) Receive, rule on, exclude, or limit evidence;

(11) Upon motion of a party, take official notice of facts;

(12) Upon motion of a party, decide cases, in whole or in part, by summary judgment where there is no disputed issue of material fact;

(13) Conduct any conference, argument, or hearing on motions in person or by telephone; and

(14) Exercise such other authority as is necessary to carry out the responsibilities of the ALJ under this part.

(c) The ALJ does not have the authority to find Federal statutes or regulations invalid.

§25.19 Prehearing conferences.

(a) The ALJ may schedule prehearing conferences as appropriate.

(b) Upon the motion of any party, the ALJ shall schedule at least one prehearing conference at a reasonable time in advance of the hearing.

(c) The ALJ may use prehearing conferences to discuss the following:

(1) Simplification of the issues;

(2) The necessity or desirability of amendments to the pleadings, including the need for a more definite statement;

(3) Stipulations and admissions of fact or as to the contents and authenticity of documents;

(4) Whether the parties can agree to submission of the case on a stipulated record;

(5) Whether a party chooses to waive appearance at an oral hearing and to submit only documentary evidence (subject to the objection of other parties) and written argument;

(6) Limitation of the number of witnesses;

(7) Scheduling dates for the exchange of witness lists and of proposed exhibits;

(8) Discovery;

(9) The time and place for the hearing; and

(10) Such other matters as may tend to expedite the fair and just disposition of the proceedings.

(d) The ALJ may issue an order containing all matters agreed upon by the parties or ordered by the ALJ at a prehearing conference.

§25.20 Disclosure of documents.

(a) Upon written request to the reviewing official, the respondent may review any relevant and material documents, transcripts, records, and other materials that related to the allegations set out in the complaint and upon which the findings and conclusions of

the investigating official under § 25.4(b) are based, unless such documents are subject to a privilege under Federal law. Upon payment of fees for duplication, the respondent may obtain copies of such documents.

(b) Upon written request to the reviewing official, the respondent also may obtain a copy of all exculpatory information in the possession of the reviewing official or investigating official relating to the allegations in the complaint, even if it is contained in a document that would otherwise be privileged. If the document would otherwise be privileged, only that portion containing exculpatory information must be disclosed.

(c) The notice sent to the Attorney General from the reviewing official as described in § 25.5 is not discoverable under any circumstances.

(d) The respondents may file a motion to compel dosclosure of the documents subject to the provisions of this section. Such a motion may only be filed with the ALJ following the filing of an answer pursuant to § 25.9.

§ 25.21 Discovery.

(a) The following types of discovery are authorized:

(1) Requests for production of documents for inspection and copying;

(2) Requests for admissions of the authenticity of any relevant document or of the truth of any relevant fact;

(3) Written interrogatories; and

(4) Depositions.

(b) For the purpose of this section and §§ 25.22 and 25.23, the term ''documents'' includes information, documents, reports, answers, records, accounts, papers, and other data and documentary evidence. Nothing contained herein shall be interpreted to require the creation of a document.

(c) Unless mutually agreed to by the parties, discovery is available only as ordered by the ALJ. The ALJ shall regulate the timing of discovery.

(d) *Motions for discovery.* (1) A party seeking discovery may file a motion with the ALJ. Such a motion shall be accompanied by a copy of the requested discovery, or in the case of depositions, a summary of the scope of the proposed deposition.

(2) Within two days of service, a party may file an opposition to the motion and/or a motion for protective order as provided in § 25.34.

(3) The ALJ may grant a motion for discovery only if he or she finds that the discovery sought—

(i) Is necessary for the expeditious, fair, and reasonable consideration of the issues;

(ii) Is not unduly costly or burdensome;

(iii) Will not unduly delay the proceeding; and

(iv) Does not seek privileged information.

(4) The burden of showing that discovery should be allowed is on the party seeking discovery.

(5) The ALJ may grant discovery subject to a protective order under § 25.24.

(e) *Depositions.* (1) If a motion for deposition is granted, the ALJ shall issue a subpoena for the deponent, which may require the deponent to produce documents. The subpoena shall specify the time and place at which the deposition will be held.

(2) The party seeking to depose shall serve the subpoena in the manner prescribed in § 25.8.

(3) The deponent may file with the ALJ a motion to quash the subpoena or a motion for a protective order within ten days of service.

(4) The party seeking to depose shall provide for the taking of a verbatim transcript of the deposition, which it shall make available to all other parties for inspection and copying.

(f) Each party shall bear its own costs of discovery.

§ 25.22 Exchange of witness lists, statements, and exhibits.

(a) At least 15 days before the hearing or at such other time as may be ordered by the ALJ, the parties shall exchange witness lists, copies of prior statements of proposed witnesses, and copies of proposed hearing exhibits, including copies of any written statements that the party intends to offer in lieu of live testimony in accordance with § 25.33(b). At the time the above documents are exchanged, any party that intends to rely on the transcript of deposition testimony in lieu of live testimony at the hearing, if permitted

by the ALJ, shall provide each party with a copy of the specific pages of the transcript it intends to introduce into evidence.

(b) If a party objects, the ALJ shall not admit into evidence the testimony of any witness whose name does not appear on the witness list or any exhibit not provided to the opposing party as provided above unless the ALJ finds good cause for the failure or that there is no prejudice to the objecting party.

(c) Unless another party objects within the time set by the ALJ, documents exchanged in accordance with paragraph (a) of this section shall be deemed to be authentic for the purpose of admissibility at the hearing.

§25.23 Subpoena for attendance at hearing.

(a) A party wishing to procure the appearance and testimony of any individual at the hearing may request that the ALJ issue a subpoena.

(b) A subpoena requiring the attendance and testimony of an individual may also require the individual to produce documents at the hearing.

(c) A party seeking a subpoena shall file a written request therefore not less than 15 days before the date fixed for the hearing unless otherwise allowed by the ALJ for good cause shown: Such request shall specify any documents to be produced and shall designate the witnesses and describe the address and location thereof with sufficient particularity to permit such witnesses to be found.

(d) The subpoena shall specify the time and place at which the witness is to appear and any documents the witness is to produce.

(e) The party seeking the subpoena shall serve it in the manner prescribed in §25.8. A subpoena on a party or upon an individual under the control of a party may be served by first class mail.

(f) A party or the individual to whom the subpoena is directed may file with the ALJ a motion to quash the subpoena within ten days after service or on or before the time specified in the subpoena for compliance if it is less than ten days after service.

§25.24 Protective order.

(a) A party of a prospective witness or deponent may file a motion for a protective order with respect to discovery sought by an opposing party or with respect to the hearing, seeking to limit the availability or disclosure of evidence.

(b) In issuing a protective order, the ALJ may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(1) That the discovery not be had;

(2) That the discovery may be had only on specified terms and conditions, including a designation of the time or place;

(3) That the discovery may be had only through a method of discovery other than that requested;

(4) That certain matters not be inquired into, or that the scope of discovery be limited to certain matters;

(5) That discovery be conducted with no one present except persons designated by the ALJ;

(6) That the contents of discovery or evidence be sealed;

(7) That a deposition after being sealed be opened only by order of the ALJ;

(8) That a trade secret or other confidential research, development, commercial information, or facts pertaining to any criminal investigation, proceeding, or other administrative investigation not be disclosed or be disclosed only in a designated way; or

(9) That the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as direct by the ALJ.

§25.25 Fees.

The party requesting a subpoena shall pay the cost of the fees and mileage of any witness subpoenaed in the amounts that would be payable to a witness in a proceeding in United States District Court. A check for witness fees and mileage shall accompany the subpoena when served, except that when a subpoena is issued on behalf of the Department of Commerce, a check for witness fees and mileage need not accompany the subpoena.

§ 25.26 Form, filing and service of papers.

(a) *Form.* (1) Documents filed with the ALJ shall include an original and one copy.

(2) Every pleading and paper filed in the proceeding shall contain a caption setting forth the title of the action, the case number assigned by the ALJ, and a designation of the paper (*e.g.*, motion to quash subpoena).

(3) Every pleading and paper shall be signed by, and shall contain the address and telephone number of, the party of the person on whose behalf the paper was filed, or his or her representative.

(4) Papers are considered filed when they are mailed. Date of mailing may be established by a certificate from the party or its representative or by proof that the document was sent by certified or registered mail.

(b) *Service.* A party filing a document with the ALJ shall, at the time of filing, serve a copy of such document on every other party. Service upon any party of any document other than the complaint or notice of hearing shall be made by deliverying or mailing a copy to the party's last known address. When a party is represented by a representative, service shall be made upon such representative in lieu of the actual party.

(c) *Proof of service.* A certificate of the individual serving the document by personal delivery or by mail, setting forth the manner of service, shall be proof of service.

§ 25.27 Computation of time.

(a) In computing any period of time under this part or in an order issued thereunder, the time begins with the day following the act, event, or default, and includes the last day of the period, unless it is a Saturday, Sunday, or legal holiday observed by the Federal government, in which event it includes the next business day.

(b) When the period of time allowed is less than seven days, intermediate Saturdays, Sundays, and legal holidays observed by the Federal government shall be excluded from the computation.

(c) Where a document has been served or issued by mail, an additional five days will be added to the time permitted for any response.

§ 25.28 Motions.

(a) Any application to the ALJ for an order or ruling shall be by motion. Motions shall state the relief sought, the authority relied upon, and the facts alleged, and shall be filed with the ALJ and served on all other parties.

(b) Except for motions made during a prehearing conference or at the hearing, all motions shall be in writing. The ALJ may require that oral motions be reduced to writing.

(c) Within 15 days after a written motion is served, or such other time as may be fixed by the ALJ, any party may file a response to such motion.

(d) The ALJ may not grant a written motion before the time for filing responses thereto has expired, except upon consent of the parties or following a hearing on the motion, but may overrule or deny such motion without awaiting a response.

(e) The ALJ shall make a reasonable effort to dispose of all outstanding motions prior to the beginning of the hearing.

§ 25.29 Sanctions.

(a) The ALJ may sanction a person, including any party or representative, for—

(1) Failing to comply with an order, rule, or procedure governing the proceeding;

(2) Failing to prosecute or defend an action; or

(3) Engaging in other misconduct that interferes with the speedy, orderly, or fair conduct of the hearing.

(b) Any such sanction, including but not limited to those listed in paragraphs (c), (d), and (e) of this section, shall reasonably relate to the severity and nature of the failure or misconduct.

(c) When a party fails to comply with an order, including an order for taking a deposition, the production of evidence within the party's control, or a request for admission, the ALJ may—

(1) Draw an inference in favor of the requesting party with regard to the information sought;

(2) In the case of requests for admission, deem each matter of which an admission is requested to be admitted;

(3) Prohibit the party failing to comply with such order from introducing evidence concerning, or otherwise relying upon, testimony relating to the information sought; and

(4) Strike any part of the pleadings or other submissions of the party failing to comply with such request.

(d) If a party fails to prosecute or defend an action under this part commenced by service of a notice of hearing, the ALJ may dismiss the action or may issue an initial decision imposing penalties and assessments.

(e) The ALJ may refuse to consider any motion, request, response, brief or other document which is not filed in a timely fashion.

§25.30 The hearing and burden of proof.

(a) The ALJ shall conduct a hearing on the record in order to determine whether the respondent is liable for a civil penalty or assessment under §25.3 and, if so, the appropriate amount of any such civil penalty or assessment considering any aggravating or mitigating factors.

(b) The authority shall prove respondent's liability and any aggravating factors by a preponderance of the evidence.

(c) The respondent shall prove any affirmative defenses and any mitigating factors by a preponderance of the evidence.

(d) The hearing shall be open to the public unless otherwise ordered by the ALJ for good cause shown.

§25.31 Determining the amount of penalties and assessments.

(a) In determining an appropriate amount of civil penalties and assessments, the ALJ and the authority head, upon appeal, should evaluate any circumstances that mitigate or aggravate the violation and should articulate in their opinions the reasons that support the penalties and assessments they impose. Because of the intangible costs of fraud, the expense of investigating such conduct, and the need to deter others who might be similarly tempted ordinarily double assessment, in lieu of damages, and a significant civil penalty should be imposed.

(b) Although not exhaustive, the following factors are among those that may influence the ALJ and the authority head in determining the amount of penalties and assessments to impose with respect to the misconduct (*i.e.*, the false, fictitious, or fraudulent claims or statements) charged in the complaint:

(1) The number of false, fictitious, or fraudulent claims or statements;

(2) The time period over which such claims or statements were made;

(3) The degree of the respondent's culpability with respect to the misconduct;

(4) The amount of money or the value of the property, services, or benefit falsely claimed;

(5) The value of the Government's actual loss as a result of the misconduct, including foreseeable consequential damages and the costs of investigation;

(6) The relationship of the amount imposed as civil penalties to the amount of the Government's loss;

(7) The potential or actual impact of the misconduct upon national defense, public health or safety, or public confidence in the management of Government programs and operations, including particularly the impact on the intended beneficiaries of such program;

(8) Whether the respondent has engaged in a pattern of the same or similar misconduct;

(9) Whether the respondent attempted to conceal the misconduct;

(10) The degree to which the respondent has involved others in the misconduct or in concealing it;

(11) Where the misconduct of employees or agents is imputed to the respondent, the extent to which the respondent's practices fostered or attempted to preclude such misconduct;

(12) Whether the respondent cooperated in or obstructed an investigation of the misconduct;

(13) Whether the respondent assisted in identifying and prosecuting other wrongdoers;

(14) The complexity of the program or transaction, and the degree of the respondent's sophistication with respect to it, including the extent of the

respondent's prior participation in the program or in similar transactions;

(15) Whether the respondent has been found, in any criminal, civil, or administrative proceeding to have engaged in similar misconduct or to have dealt dishonestly with the Government of the United States or of a State directly or indirectly; and

(16) The need to deter the respondent and others from engaging in the same or similar misconduct.

(c) Nothing in this section shall be construed to limit the ALJ or the authority head from considering any other factors that in any given case may mitigate or aggravate the offense for which penalties and assessments are imposed.

§ 25.32 Location of hearing.

(a) The hearing may be held—

(1) In any judicial district of the United States in which the respondent resides or transacts business;

(2) In any judicial district of the United States in which the claim or statement in issue was made; or

(3) In such other place as may be agreed upon by the respondent and the ALJ.

(b) Each party shall have the opportunity to present arguments with respect to the location of the hearing.

(c) The hearing shall be held at the place and at the time ordered by the ALJ.

§ 25.33 Witnesses.

(a) Except as provided in paragraph (b) of this section, testimony at the hearing shall be given orally by witnesses under oath or affirmation.

(b) At the discretion of the ALJ, testimony may be admitted in the form of a written statement or deposition. Any such written statements must be provided to all other parties along with the last known address of such witness, in a manner which allows sufficient time for other parties to subpoena such witness for cross-examination at the hearing. Prior written statements of witnesses proposed to testify at the hearing and deposition transcripts shall be exchanged as provided in § 25.22(a).

(c) The ALJ shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to—

(1) Make the interrogation and presentation effective for the ascertainment of the truth;

(2) Avoid needless consumption of time; and

(3) Protect witnesses from harassment or undue embarrassment.

(d) The ALJ shall permit the parties to conduct such cross-examination as may be required for a full and true disclosure of the facts.

(e) At the discretion of the ALJ, a witness may be cross-examined on matters relevant to the proceeding without regard to the scope of his or her direct examination. To the extent permitted by the ALJ, cross-examination on matters outside the scope of direct examination shall be conducted in the manner of direct examination and may proceed by leading questions only if the witness is a hostile witness, an adverse party or a witness identified with an adverse party.

(f) Upon motion of any party, the ALJ shall order witnesses excluded so that they cannot hear the testimony of other witnesses. This rule does not authorize exclusion of—

(1) A party who is an individual;

(2) In the case of a party that is not an individual, an officer or employee of the party designated by the party's representative; or

(3) An individual whose presence is shown by a party to be essential to the presentation of its case, including an individual employed by the Government engaged in assisting the representative for the Government.

§ 25.34 Evidence.

(a) The ALJ shall determine the admissibility of evidence.

(b) Except as provided in this part, the ALJ shall not be bound by the Federal Rules of Evidence. However, the ALJ may apply the Federal Rules of Evidence where appropriate, *e.g.*, to exclude unreliable evidence.

(c) The ALJ shall exclude irrelevant and immaterial evidence.

(d) Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or by considerations of undue

delay or needless presentation of cumulative evidence.

(e) Although relevant, evidence may be excluded if it is privileged under Federal law.

(f) Evidence concerning offers of compromise or settlement shall be inadmissible to the extent provided in Rule 408 of the Federal Rules of Evidence.

(g) The ALJ shall permit the parties to introduce rebuttal witnesses and evidence.

(h) All documents and other evidence offered or taken for the record shall be open to examination by all parties, unless otherwise ordered by the ALJ pursuant to §25.24.

§25.35 The record.

(a) The hearing will be recorded and transcribed. Transcripts may be obtained following the hearing from the ALJ at a cost not to exceed the actual cost of duplication.

(b) The transcript of testimony, exhibits and other evidence admitted at the hearing, and all papers and requests filed in the proceeding constitute the record for the decision by the ALJ and the authority head.

(c) The record may be inspected and copied (upon payment of a reasonable fee) by anyone, unless otherwise ordered by the ALJ pursuant to §25.24.

§25.36 Post-hearing briefs.

The ALJ may require the parties to file post-hearing briefs. In any event, any party may file a post-hearing brief. The ALJ shall fix the time for filing such briefs, not to exceed 60 days from the date the parties receive the transcript of the hearing or, if applicable, the stipulated record. Such briefs may be accompanied by proposed findings of fact and conclusions of law. The ALJ may permit the parties to file reply briefs.

§25.37 Initial decision.

(a) The ALJ shall issue an initial decision based only on the record, which shall contain findings of fact, conclusions of law, and the amount of any penalties and assessments imposed.

(b) The findings of fact shall include a finding on each of the following issues:

(1) Whether the claims or statements identified in the complaint, or any portions thereof, violate §25.3.

(2) If the person is liable for penalties or assessments, the appropriate amount of any such penalties or assessments considering any mitigating or aggravating factors that he or she finds in the case, such as those described in §25.31.

(c) The ALJ shall promptly serve the initial decision on all parties within 90 days after the time for submission of post-hearing briefs and reply briefs (if permittted) has expired. The ALJ shall as the same time serve all respondents with a statement describing the right of any respondent determined to be liable for a civil penalty or assessment to file a motion for reconsideration with the ALJ or a notice of appeal with the authority head. If the ALJ fails to meet the deadline contained in this paragraph, he or she shall notify the parties of the reason for the delay and shall set a new deadline.

(d) Unless the initial decision of the ALJ is timely appealed to the authority head, or a motion for reconsideration of the initial decision is timely filed, the initial decision shall constitute the final decision of the authority head and shall be final and binding on the parties 30 days after it is issued by the ALJ.

§25.38 Reconsideration of initial decision.

(a) Except as provided in paragraph (d) of this section, any party may file a motion for reconsideration of the initial decision within 20 days of receipt of the initial decision. If service was made by mail, receipt will be presumed to be five days from the date of mailing in the absence of contrary proof.

(b) Every such motion must set forth the matters claimed to have been erroneously decided and the nature of the alleged errors. Such motion shall be accompanied by a supporting brief.

(c) Responses to such motions shall be allowed only upon request of the ALJ.

(d) No party may file a motion for reconsideration of an initial decision that has been revised in response to a previous motion for reconsideration.

(e) The ALJ may dispose of a motion for reconsideration by denying it or by issuing a revised initial decision.

(f) If the ALJ denies a motion for reconsideration, the initial decision shall constitute the final decision of the authority head and shall be final and binding on the parties 30 days after the ALJ denies the motion, unless the initial decision is timely appealed to the authority head in accordance with § 25.39.

(g) If the ALJ issues a revised initial decision, that decision shall constitute the final decision of the authority head and shall be final and binding on the parties 30 days after it is issued, unless it is timely appealed to the authority head in accordance with § 25.39.

§ 25.39 Appeal to authority head.

(a) Any respondent who has filed a timely answer and who is determined in an initial decision to be liable for a civil penalty or assessment may appeal such decision to the authority head by filing a notice of appeal with the authority head in accordance with this section.

(b)(1) No notice of appeal may be filed until the time period for filing a motion for reconsideration under § 25.38 has expired.

(2) If a motion for reconsideration is timely filed, a notice of appeal must be filed within 30 days after the ALJ denies the motion or issues a revised initial decision, whichever applies.

(3) If no motion for reconsideration is timely filed, a notice of appeal must be filed within 30 days after the ALJ issues the initial decision.

(4) The authority head may extend the initial 30 day period for an additional 30 days if the respondent files with the authority head a request for an extension within the initial 30 day period and shows good cause.

(c) If the respondent files a timely notice of appeal with the authority head, the ALJ shall forward the record of the proceeding to the authority head.

(d) A notice of appeal shall be accompanied by a written brief specifying exceptions to the initial decision and reasons supporting the exceptions.

(e) The representative for the Government may file a brief in opposition to exceptions within 30 days of receiving the notice of appeal and accompanying brief.

(f) There is no right to appear personally before the authority head.

(g) There is no right to appeal any interlocutory ruling by the ALJ.

(h) In reviewing the initial decision, the authority head shall not consider any objection that was not raised before the ALJ unless a demonstration is made of extraordinary circumstances causing the failure to raise the objection.

(i) If any party demonstrates to the satisfaction of the authority head that additional evidence not presented at such hearing is material and that there was reasonable grounds for the failure to present such evidence at such hearing, the authority head shall remand the matter to the ALJ for consideration of such additional evidence.

(j) The authority head may affirm, reduce, reverse, compromise, remand, or settle any penalty or assessment determined by the ALJ in any initial decision.

(k) The authority head shall promptly serve each party to the appeal with a copy of the decision of the authority head and a statement describing the right of any person determined to be liable for a penalty or assessment to seek judicial review.

(l) Unless a petition for review is filed as provided in 31 U.S.C. 3805 after a respondent has exhausted all administrative remedies under this part and within 60 days after the date on which the authority head serves the respondent with a copy of the authority head's decision, a determination that a respondent is liable under § 25.3 is final and is not subject to judicial review.

§ 25.40 Stays ordered by the Department of Justice.

If at any time the Attorney General or an Assistant Attorney General designated by the Attorney General transmits to the authority head a written finding that continuation of the administrative process described in this part with respect to a claim or statement may adversely affect any pending or potential criminal or civil action related to such claim or statement, the authority head shall stay the process and

it shall be resumed only upon receipt of the written authorization of the Attorney General.

§25.41 Stay pending appeal.

(a) An initial decision is stayed automatically pending disposition of a motion for reconsideration or of an appeal to the authority head.

(b) No administrative stay is available following a final decision of the authority head.

§25.42 Judicial review.

Section 3805 of title 31, United States Code, authorized judicial review by an appropriate United States District Court of a final decision of the authority head imposing penalties or assessments under this part and specifies the procedures for such review.

§25.43 Collection of civil penalties and assessments.

Sections 3806 and 3808(b) of title 31, United States Code, authorize actions for collection of civil penalties and assessments imposed under this part and specify the procedures for such actions.

§25.44 Right to administrative offset.

The amount of any penalty or assessment which has become final, or for which a judgment has been entered under §§25.42 and 25.43, or any amount agreed upon in a compromise or settlement under §25.46, may be collected by administrative offset under 31 U.S.C. 3716, except that an administrative offset may not be made under this subsection against a refund of an overpayment of Federal taxes, then or later owing by the United States to the respondent.

§25.45 Deposit in Treasury of United States.

All amounts collected pursuant to this part shall be deposited as miscellaneous receipts in the Treasury of the United States, except as provided in 31 U.S.C. 3806(g).

§25.46 Compromise or settlement.

(a) Parties may make offers of compromise or settlement at any time.

(b) The reviewing official has the exclusive authority to compromise or settle a case under this part at any time after the date on which the reviewing official is permitted to issue a complaint and before the date on which the ALJ issues an initial decision. If the designated representative of the Government is not with the Office of General Counsel, the representative shall forward all settlement offers to the reviewing official and cannot negotiate a compromise or settlement with the respondent except as directed by the reviewing official.

(c) The authority head has exclusive authority to compromise or settle a case under this part at any time after the date on which the ALJ issues an initial decision, except during the pendency of any review under §25.42 or during the pendency of any action to collect penalties and assessments under §25.43.

(d) The Attorney General has exclusive authority to compromise or settle a case under this part during the pendency of any review under §25.42 or of any action to recover penalties and assessments under 31 U.S.C. 3806.

(e) The investigating official may recommend settlement terms to the reviewing official, the authority head, or the Attorney General, as appropriate. The reviewing official may recommend settlement terms to the authority head, or the Attorney General, as appropriate.

(f) Any compromise or settlement must be in writing.

§25.47 Limitations.

(a) The notice of hearing with respect to a claim or statement must be served in the manner specified in §25.8 within 6 years after the date on which such claim or statement is made.

(b) If the respondent fails to file a timely answer, service of a notice under §25.10(b) shall be deemed a notice of hearing for purposes of this section.

(c) The statute of limitations may be extended by agreement of the parties.

PART 26—GOVERNMENTWIDE DEBARMENT AND SUSPENSION (NONPROCUREMENT) AND GOVERNMENTWIDE REQUIREMENTS FOR DRUG-FREE WORKPLACE (GRANTS)

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APPENDIX C TO PART 26—CERTIFICATION REGARDING DRUG-FREE WORKPLACE REQUIREMENTS

AUTHORITY: 5 U.S.C. 301; 41 U.S.C. 701 *et seq.*; Sec. 2455, Pub. L. 103–355, 108 Stat. 3327 (31 U.S.C. 6101 note); E.O. 12549, 3 CFR, 1986 comp., p. 189; E.O. 12689, 3 CFR, 1989 comp., p. 235.

SOURCE: 53 FR 19177, 19204, May 26, 1988, unless otherwise noted.

CROSS REFERENCE: See also Office of Management and Budget notice published at 55 FR 21679, May 25, 1990, and 60 FR 33036, June 26, 1995.

EDITORIAL NOTE: For additional information, see related documents published at 52 FR 20360, May 29, 1987, 53 FR 19160, May 26, 1988, and 53 FR 34474, September 6, 1988.

Subpart A—General

§ 26.100 Purpose.

(a) Executive Order (E.O.) 12549 provides that, to the extent permitted by law, Executive departments and agencies shall participate in a governmentwide system for nonprocurement debarment and suspension. A person who is debarred or suspended shall be excluded from Federal financial and nonfinancial assistance and benefits under Federal programs and activities. Debarment or suspension of a participant in a program by one agency shall have governmentwide effect.

(b) These regulations implement section 3 of E.O. 12549 and the guidelines promulgated by the Office of Management and Budget under section 6 of the E.O. by:

(1) Prescribing the programs and activities that are covered by the governmentwide system;

(2) Prescribing the governmentwide criteria and governmentwide minimum due process procedures that each agency shall use;

(3) Providing for the listing of debarred and suspended participants, participants declared ineligible (see definition of ''ineligible'' in §26.105), and participants who have voluntarily excluded themselves from participation in covered transactions;

(4) Setting forth the consequences of a debarment, suspension, determination of ineligibility, or voluntary exclusion; and

(5) Offering such other guidance as necessary for the effective implementation and administration of the governmentwide system.

(c) These regulations also implement Executive Order 12689 (3 CFR, 1989 Comp., p. 235) and 31 U.S.C. 6101 note (Public Law 103–355, sec. 2455, 108 Stat. 3327) by—

(1) Providing for the inclusion in the *List of Parties Excluded from Federal Procurement and Nonprocurement Programs* all persons proposed for debarment, debarred or suspended under the Federal Acquisition Regulation, 48 CFR Part 9, subpart 9.4; persons against which governmentwide exclusions have been entered under this part; and persons determined to be ineligible; and

(2) Setting forth the consequences of a debarment, suspension, determination of ineligibility, or voluntary exclusion.

(d) Although these regulations cover the listing of ineligible participants and the effect of such listing, they do not prescribe policies and procedures governing declarations of ineligibility.

[60 FR 33040, 33044, June 26, 1995]

§26.105 Definitions.

The following definitions apply to this part:

Adequate evidence. Information sufficient to support the reasonable belief that a particular act or omission has occurred.

Affiliate. Persons are affiliates of each other if, directly or indirectly, either one controls or has the power to control the other, *or*, a third person controls or has the power to control both. Indicia of control include, but are not limited to: interlocking management or ownership, identity of interests among family members, shared facilities and equipment, common use of employees, or a business entity organized following the suspension or debarment of a person which has the same or similar management, ownership, or principal employees as the suspended, debarred, ineligible, or voluntarily excluded person.

Agency. Any executive department, military department or defense agency or other agency of the executive branch, excluding the independent regulatory agencies.

Civil judgment. The disposition of a civil action by any court of competent jurisdiction, whether entered by verdict, decision, settlement, stipulation, or otherwise creating a civil liability for the wrongful acts complained of; or a final determination of liability under the Program Fraud Civil Remedies Act of 1988 (31 U.S.C. 3801–12).

Conviction. A judgment or conviction of a criminal offense by any court of competent jurisdiction, whether entered upon a verdict or a plea, including a plea of nolo contendere.

Debarment. An action taken by a debarring official in accordance with these regulations to exclude a person from participating in covered transactions. A person so excluded is ''debarred.''

Debarring official. An official authorized to impose debarment. The debarring official is either:

(1) The agency head, or

(2) An official designated by the agency head.

Indictment. Indictment for a criminal offense. An information or other filing by competent authority charging a criminal offense shall be given the same effect as an indictment.

Ineligible. Excluded from participation in Federal nonprocurement programs pursuant to a determination of ineligibility under statutory, executive order, or regulatory authority, other than Executive Order 12549 and its agency implementing regulations; for example, excluded pursuant to the Davis-Bacon Act and its implementing regulations, the equal employment opportunity acts and executive orders, or the environmental protection acts and executive orders. A person is ineligible where the determination of ineligibility affects such person's eligibility to participate in more than one covered transaction.

Legal proceedings. Any criminal proceeding or any civil judicial proceeding to which the Federal Government or a State or local government or quasi-governmental authority is a party. The term includes appeals from such proceedings.

List of Parties Excluded from Federal Procurement and Nonprocurement Programs. A list compiled, maintained and distributed by the General Services Administration (GSA) containing the names and other information about persons who have been debarred, suspended, or voluntarily excluded under Executive Orders 12549 and 12689 and these regulations or 48 CFR part 9, subpart 9.4, persons who have been proposed for debarment under 48 CFR part 9, subpart 9.4, and those persons who have been determined to be ineligible.

Notice. A written communication served in person or sent by certified mail, return receipt requested, or its equivalent, to the last known address of a party, its identified counsel, its agent for service of process, or any partner, officer, director, owner, or joint venturer of the party. Notice, if undeliverable, shall be considered to have been received by the addressee five days after being properly sent to the last address known by the agency.

Participant. Any person who submits a proposal for, enters into, or reasonably may be expected to enter into a covered transaction. This term also includes any person who acts on behalf of or is authorized to commit a participant in a covered transaction as an agent or representative of another participant.

Person. Any individual, corporation, partnership, association, unit of government or legal entity, however organized, except: foreign governments or foreign governmental entities, public international organizations, foreign government owned (in whole or in part) or controlled entities, and entities consisting wholly or partially of foreign governments or foreign governmental entities.

Preponderance of the evidence. Proof by information that, compared with that opposing it, leads to the conclusion that the fact at issue is more probably true than not.

Principal. Officer, director, owner, partner, key employee, or other person within a participant with primary management or supervisory responsibilities; or a person who has a critical influence on or substantive control over a covered transaction, whether or not employed by the participant. Persons who have a critical influence on or substantive control over a covered transaction are:

(1) Principal investigators.

(2) [Reserved]

Proposal. A solicited or unsolicited bid, application, request, invitation to consider or similar communication by or on behalf of a person seeking to participate or to receive a benefit, directly or indirectly, in or under a covered transaction.

Respondent. A person against whom a debarment or suspension action has been initiated.

State. Any of the States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, or any agency of a State, exclusive of institutions of higher education, hospitals, and units of local government. A State instrumentality will be considered part of the State government if it has a written determination from a State government that such State considers that instrumentality to be an agency of the State government.

Suspending official. An official authorized to impose suspension. The suspending official is either:

(1) The agency head, or

(2) An official designated by the agency head.

Suspension. An action taken by a suspending official in accordance with these regulations that immediately excludes a person from participating in covered transactions for a temporary period, pending completion of an investigation and such legal, debarment, or Program Fraud Civil Remedies Act proceedings as may ensue. A person so excluded is ''suspended.''

Voluntary exclusion or voluntarily excluded. A status of nonparticipation or

limited participation in covered transactions assumed by a person pursuant to the terms of a settlement.

[53 FR 19177, 19204, May 26, 1988, as amended at 60 FR 33041, 33044, June 26, 1995.

§26.110 Coverage.

(a) These regulations apply to all persons who have participated, are currently participating or may reasonably be expected to participate in transactions under Federal nonprocurement programs. For purposes of these regulations such transactions will be referred to as ''covered transactions.''

(1) *Covered transaction.* For purposes of these regulations, a covered transaction is a primary covered transaction or a lower tier covered transaction. Covered transactions at any tier need not involve the transfer of Federal funds.

(i) *Primary covered transaction.* Except as noted in paragraph (a)(2) of this section, a primary covered transaction is any nonprocurement transaction between an agency and a person, regardless of type, including: grants, cooperative agreements, scholarships, fellowships, contracts of assistance, loans, loan guarantees, subsidies, insurance, payments for specified use, donation agreements and any other nonprocurement transactions between a Federal agency and a person. Primary covered transactions also include those transactions specially designated by the U.S. Department of Housing and Urban Development in such agency's regulations governing debarment and suspension.

(ii) *Lower tier covered transaction.* A lower tier covered transaction is:

(A) Any transaction between a participant and a person other than a procurement contract for goods or services, regardless of type, under a primary covered transaction.

(B) Any procurement contract for goods or services between a participant and a person, regardless of type, expected to equal or exceed the Federal procurement small purchase threshold fixed at 10 U.S.C. 2304(g) and 41 U.S.C. 253(g) (currently $25,000) under a primary covered transaction.

(C) Any procurement contract for goods or services between a participant and a person under a covered transaction, regardless of amount, under which that person will have a critical influence on or substantive control over that covered transaction. Such persons are:

(*1*) Principal investigators.

(*2*) Providers of federally-required audit services.

(2) *Exceptions.* The following transactions are not covered:

(i) Statutory entitlements or mandatory awards (but not subtier awards thereunder which are not themselves mandatory), including deposited funds insured by the Federal Government;

(ii) Direct awards to foreign governments or public international organizations, or transactions with foreign governments or foreign governmental entities, public international organizations, foreign government owned (in whole or in part) or controlled entities, entities consisting wholly or partially of foreign governments or foreign governmental entities;

(iii) Benefits to an individual as a personal entitlement without regard to the individual's present responsibility (but benefits received in an individual's business capacity are not excepted);

(iv) Federal employment;

(v) Transactions pursuant to national or agency-recognized emergencies or disasters;

(vi) Incidental benefits derived from ordinary governmental operations; and

(vii) Other transactions where the application of these regulations would be prohibited by law.

(3) *Department of Commerce covered transactions.* These Department of Commerce regulations apply to the Department's domestic assistance covered transactions (whether by a Federal agency, recipient, subrecipient, or intermediary) including, except as noted in paragraph (a)(2) of this section: grants, cooperative agreements, scholarships, fellowships, loans, loan guarantees, subsidies, insurance, payments for specified use, and donation agreement subawards, subcontracts and transactions at any tier that are charges as direct or indirect costs, regardless of type (including subtier awards under awards which are statutory entitlement or mandatory awards).

(b) *Relationship to other sections.* This section describes the types of transactions to which a debarment or suspension under the regulations will apply. Subpart B, ''Effect of Action,'' § 26.200, ''Debarment or suspension,'' sets forth the consequences of a debarment or suspension. Those consequences would obtain only with respect to participants and principals in the covered transactions and activities described in § 26.110(a). Sections 26.325, ''Scope of debarment,'' and 26.420, ''Scope of suspension,'' govern the extent to which a specific participant or organizational elements of a participant would be automatically included within a debarment or suspension action, and the conditions under which affiliates or persons associated with a participant may also be brought within the scope of the action.

(c) *Relationship to Federal procurement activities.* In accordance with E.O. 12689 and section 2455 of Public Law 103–355, any debarment, suspension, proposed debarment or other governmentwide exclusion initiated under the Federal Acquisition Regulation (FAR) on or after August 25, 1995 shall be recognized by and effective for Executive Branch agencies and participants as an exclusion under this regulation. Similarly, any debarment, suspension or other governmentwide exclusion initiated under this regulation on or after August 25, 1995 shall be recognized by and effective for those agencies as a debarment or suspension under the FAR.

[53 FR 19177, 19204, May 26, 1988, as amended at 53 FR 19178, May 26, 1988, 60 FR 33041, 33044, June 26, 1995]

§ 26.115 Policy.

(a) In order to protect the public interest, it is the policy of the Federal Government to conduct business only with responsible persons. Debarment and suspension are discretionary actions that, taken in accordance with Executive Order 12549 and these regulations, are appropriate means to implement this policy.

(b) Debarment and suspension are serious actions which shall be used only in the public interest and for the Federal Government's protection and not for purposes of punishment. Agencies may impose debarment or suspension for the causes and in accordance with the procedures set forth in these regulations.

(c) When more than one agency has an interest in the proposed debarment or suspension of a person, consideration shall be given to designating one agency as the lead agency for making the decision. Agencies are encouraged to establish methods and procedures for coordinating their debarment or suspension actions.

Subpart B—Effect of Actions

§ 26.200 Debarment or suspension.

(a) *Primary covered transactions.* Except to the extent prohibited by law, persons who are debarred or suspended shall be excluded from primary covered transactions as either participants or principals throughout the Executive Branch of the Federal Government for the period of their debarment, suspension, or the period they are proposed for debarment under 48 CFR part 9, subpart 9.4. Accordingly, no agency shall enter into primary covered transactions with such excluded persons during such period, except as permitted pursuant to § 26.215.

(b) *Lower tier covered transactions.* Except to the extent prohibited by law, persons who have been proposed for debarment under 48 CFR part 9, subpart 9.4, debarred or suspended shall be excluded from participating as either participants or principals in all lower tier covered transactions (see § 26.110(a)(1)(ii)) for the period of their exclusion.

(c) *Exceptions.* Debarment or suspension does not affect a person's eligibility for—

(1) Statutory entitlements or mandatory awards (but not subtier awards thereunder which are not themselves mandatory), including deposited funds insured by the Federal Government;

(2) Direct awards to foreign governments or public international organizations, or transactions with foreign governments or foreign governmental entities, public international organizations, foreign government owned (in whole or in part) or controlled entities, and entities consisting wholly or partially of foreign governments or foreign governmental entities;

(3) Benefits to an individual as a personal entitlement without regard to the individual's present responsibility (but benefits received in an individual's business capacity are not excepted);

(4) Federal employment;

(5) Transactions pursuant to national or agency-recognized emergencies or disasters;

(6) Incidental benefits derived from ordinary governmental operations; and

(7) Other transactions where the application of these regulations would be prohibited by law.

[60 FR 33041, 33044, June 26, 1995]

§26.205 Ineligible persons.

Persons who are ineligible, as defined in §26.105(i), are excluded in accordance with the applicable statutory, executive order, or regulatory authority.

§26.210 Voluntary exclusion.

Persons who accept voluntary exclusions under §26.315 are excluded in accordance with the terms of their settlements. Department of Commerce shall, and participants may, contact the original action agency to ascertain the extent of the exclusion.

§26.215 Exception provision.

The Department of Commerce may grant an exception permitting a debarred, suspended, or voluntarily excluded person, or a person proposed for debarment under 48 CFR part 9, subpart 9.4, to participate in a particular covered transaction upon a written determination by the agency head or an authorized designee stating the reason(s) for deviating from the Presidential policy established by Executive Order 12549 and §26.200. However, in accordance with the President's stated intention in the Executive Order, exceptions shall be granted only infrequently. Exceptions shall be reported in accordance with §26.505(a).

[60 FR 33041, 33044, June 26, 1995]

§26.220 Continuation of covered transactions.

(a) Notwithstanding the debarment, suspension, proposed debarment under 48 CFR part 9, subpart 9.4, determination of ineligibility, or voluntary exclusion of any person by an agency, agencies and participants may continue covered transactions in existence at the time the person was debarred, suspended, proposed for debarment under 48 CFR part 9, subpart 9.4, declared ineligible, or voluntarily excluded. A decision as to the type of termination action, if any, to be taken should be made only after thorough review to ensure the propriety of the proposed action.

(b) Agencies and participants shall not renew or extend covered transactions (other than no-cost time extensions) with any person who is debarred, suspended, proposed for debarment under 48 CFR part 9, subpart 9.4, ineligible or voluntary excluded, except as provided in §26.215.

[60 FR 33041, 33044, June 26, 1995]

§26.225 Failure to adhere to restrictions.

(a) Except as permitted under §26.215 or §26.220, a participant shall not knowingly do business under a covered transaction with a person who is—

(1) Debarred or suspended;

(2) Proposed for debarment under 48 CFR part 9, subpart 9.4; or

(3) Ineligible for or voluntarily excluded from the covered transaction.

(b) Violation of the restriction under paragraph (a) of this section may result in disallowance of costs, annulment or termination of award, issuance of a stop work order, debarment or suspension, or other remedies as appropriate.

(c) A participant may rely upon the certification of a prospective participant in a lower tier covered transaction that it and its principals are not debarred, suspended, proposed for debarment under 48 CFR part 9, subpart 9.4, ineligible, or voluntarily excluded from the covered transaction (See appendix B of these regulations), unless it knows that the certification is erroneous. An agency has the burden of proof that a participant did knowingly do business with a person that filed an erroneous certification.

[60 FR 33041, 33044, June 26, 1995]

Subpart C—Debarment

§ 26.300 General.

The debarring official may debar a person for any of the causes in § 26.305, using procedures established in §§ 26.310 through 26.314. The existence of a cause for debarment, however, does not necessarily require that the person be debarred; the seriousness of the person's acts or omissions and any mitigating factors shall be considered in making any debarment decision.

§ 26.305 Causes for debarment.

Debarment may be imposed in accordance with the provisions of §§ 26.300 through 26.314 for:

(a) Conviction of or civil judgment for:

(1) Commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public or private agreement or transaction;

(2) Violation of Federal or State antitrust statutes, including those proscribing price fixing between competitors, allocation of customers between competitors, and bid rigging;

(3) Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, receiving stolen property, making false claims, or obstruction of justice; or

(4) Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a person.

(b) Violation of the terms of a public agreement or transaction so serious as to affect the integrity of an agency program, such as:

(1) A willful failure to perform in accordance with the terms of one or more public agreements or transactions;

(2) A history of failure to perform or of unsatisfactory performance of one or more public agreements or transactions; or

(3) A willful violation of a statutory or regulatory provision or requirement applicable to a public agreement or transaction.

(c) Any of the following causes:

(1) A nonprocurement debarment by any Federal agency taken before October 1, 1988, the effective date of these regulations, or a procurement debarment by any Federal agency taken pursuant to 48 CFR subpart 9.4;

(2) Knowingly doing business with a debarred, suspended, ineligible, or voluntarily excluded person, in connection with a covered transaction, except as permitted in § 26.215 or § 26.220;

(3) Failure to pay a single substantial debt, or a number of outstanding debts (including disallowed costs and overpayments, but not including sums owed the Federal Government under the Internal Revenue Code) owed to any Federal agency or instrumentality, provided the debt is uncontested by the debtor or, if contested, provided that the debtor's legal and administrative remedies have been exhausted;

(4) Violation of a material provision of a voluntary exclusion agreement entered into under § 26.315 or of any settlement of a debarment or suspension action; or

(5) Violation of any requirement of subpart F of this part, relating to providing a drug-free workplace, as set forth in § 26.615 of this part.

(d) Any other cause of so serious or compelling a nature that it affects the present responsibility of a person.

[53 FR 19177, 19204, May 26, 1988, as amended at 54 FR 4950 and 4954, Jan. 31, 1989]

§ 26.310 Procedures.

Department of Commerce shall process debarment actions as informally as practicable, consistent with the principles of fundamental fairness, using the procedures in §§ 26.311 through 26.314.

§ 26.311 Investigation and referral.

Information concerning the existence of a cause for debarment from any source shall be promptly reported, investigated, and referred, when appropriate, to the debarring official for consideration. After consideration, the debarring official may issue a notice of proposed debarment.

§ 26.312 Notice of proposed debarment.

A debarment proceeding shall be initiated by notice to the respondent advising:

(a) That debarment is being considered;

(b) Of the reasons for the proposed debarment in terms sufficient to put the respondent on notice of the conduct or transaction(s) upon which it is based;

(c) Of the cause(s) relied upon under §26.305 for proposing debarment;

(d) Of the provisions of §26.311 through §26.314, and any other Department of Commerce procedures, if applicable, governing debarment decision-making; and

(e) Of the potential effect of a debarment.

§26.313 Opportunity to contest proposed debarment.

(a) *Submission in opposition.* Within 30 days after receipt of the notice of proposed debarment, the respondent may submit, in person, in writing, or through a representative, information and argument in opposition to the proposed debarment.

(b) *Additional proceedings as to disputed material facts.* (1) In actions not based upon a conviction or civil judgment, if the debarring official finds that the respondent's submission in opposition raises a genuine dispute over facts material to the proposed debarment, respondent(s) shall be afforded an opportunity to appear with a representative, submit documentary evidence, present witnesses, and confront any witness the agency presents.

(2) A transcribed record of any additional proceedings shall be made available at cost to the respondent, upon request, unless the respondent and the agency, by mutual agreement, waive the requirement for a transcript.

§26.314 Debarring official's decision.

(a) *No additional proceedings necessary.* In actions based upon a conviction or civil judgment, or in which there is no genuine dispute over material facts, the debarring official shall make a decision on the basis of all the information in the administrative record, including any submission made by the respondent. The decision shall be made within 45 days after receipt of any information and argument submitted by the respondent, unless the debarring official extends this period for good cause.

(b) *Additional proceedings necessary.* (1) In actions in which additional proceedings are necessary to determine disputed material facts, written findings of fact shall be prepared. The debarring official shall base the decision on the facts as found, together with any information and argument submitted by the respondent and any other information in the administrative record.

(2) The debarring official may refer disputed material facts to another official for findings of fact. The debarring official may reject any such findings, in whole or in part, only after specifically determining them to be arbitrary and capricious or clearly erroneous.

(3) The debarring official's decision shall be made after the conclusion of the proceedings with respect to disputed facts.

(c)(1) *Standard of proof.* In any debarment action, the cause for debarment must be established by a preponderance of the evidence. Where the proposed debarment is based upon a conviction or civil judgment, the standard shall be deemed to have been met.

(2) *Burden of proof.* The burden of proof is on the agency proposing debarment.

(d) *Notice of debarring official's decision.* (1) If the debarring official decides to impose debarment, the respondent shall be given prompt notice:

(i) Referring to the notice of proposed debarment;

(ii) Specifying the reasons for debarment;

(iii) Stating the period of debarment, including effective dates; and

(iv) Advising that the debarment is effective for covered transactions throughout the executive branch of the Federal Government unless an agency head or an authorized designee makes the determination referred to in §26.215.

(2) If the debarring official decides not to impose debarment, the respondent shall be given prompt notice of that decision. A decision not to impose debarment shall be without prejudice to a subsequent imposition of debarment by any other agency.

§ 26.315 Settlement and voluntary exclusion.

(a) When in the best interest of the Government, Department of Commerce may, at any time, settle a debarment or suspension action.

(b) If a participant and the agency agree to a voluntary exclusion of the participant, such voluntary exclusion shall be entered on the Nonprocurement List (see subpart E).

§ 26.320 Period of debarment.

(a) Debarment shall be for a period commensurate with the seriousness of the cause(s). If a suspension precedes a debarment, the suspension period shall be considered in determining the debarment period.

(1) Debarment for causes other than those related to a violation of the requirements of subpart F of this part generally should not exceed three years. Where circumstances warrant, a longer period of debarment may be imposed.

(2) In the case of a debarment for a violation of the requirements of subpart F of this part (*see* § 26.305(c)(5)), the period of debarment shall not exceed five years.

(b) The debarring official may extend an existing debarment for an additional period, if that official determines that an extension is necessary to protect the public interest. However, a debarment may not be extended solely on the basis of the facts and circumstances upon which the initial debarment action was based. If debarment for an additional period is determined to be necessary, the procedures of §§ 26.311 through 26.314 shall be followed to extend the debarment.

(c) The respondent may request the debarring official to reverse the debarment decision or to reduce the period or scope of debarment. Such a request shall be in writing and supported by documentation. The debarring official may grant such a request for reasons including, but not limited to:

(1) Newly discovered material evidence;

(2) Reversal of the conviction or civil judgment upon which the debarment was based;

(3) Bona fide change in ownership or management;

(4) Elimination of other causes for which the debarment was imposed; or

(5) Other reasons the debarring official deems appropriate.

[53 FR 19177, 19204, May 26, 1988, as amended at 54 FR 4950 and 4954, Jan. 31, 1989]

§ 26.325 Scope of debarment.

(a) *Scope in general.* (1) Debarment of a person under these regulations constitutes debarment of all its divisions and other organizational elements from all covered transactions, unless the debarment decision is limited by its terms to one or more specifically identified individuals, divisions or other organizational elements or to specific types of transactions.

(2) The debarment action may include any affiliate of the participant that is specifically named and given notice of the proposed debarment and an opportunity to respond (see §§ 26.311 through 26.314).

(b) *Imputing conduct.* For purposes of determining the scope of debarment, conduct may be imputed as follows:

(1) *Conduct imputed to participant.* The fraudulent, criminal or other seriously improper conduct of any officer, director, shareholder, partner, employee, or other individual associated with a participant may be imputed to the participant when the conduct occurred in connection with the individual's performance of duties for or on behalf of the participant, or with the participant's knowledge, approval, or acquiescence. The participant's acceptance of the benefits derived from the conduct shall be evidence of such knowledge, approval, or acquiescence.

(2) *Conduct imputed to individuals associated with participant.* The fraudulent, criminal, or other seriously improper conduct of a participant may be imputed to any officer, director, shareholder, partner, employee, or other individual associated with the participant who participated in, knew of, or had reason to know of the participant's conduct.

(3) *Conduct of one participant imputed to other participants in a joint venture.* The fraudulent, criminal, or other seriously improper conduct of one participant in a joint venture, grant pursuant to a joint application, or similar arrangement may be imputed to other

participants if the conduct occurred for or on behalf of the joint venture, grant pursuant to a joint application, or similar arrangement may be imputed to other participants if the conduct occurred for or on behalf of the joint venture, grant pursuant to a joint application, or similar arrangement or with the knowledge, approval, or acquiescence of these participants. Acceptance of the benefits derived from the conduct shall be evidence of such knowledge, approval, or acquiescence.

Subpart D—Suspension

§26.400 General.

(a) The suspending official may suspend a person for any of the causes in §26.405 using procedures established in §§26.410 through 26.413.

(b) Suspension is a serious action to be imposed only when:

(1) There exists adequate evidence of one or more of the causes set out in §26.405, and

(2) Immediate action is necessary to protect the public interest.

(c) In assessing the adequacy of the evidence, the agency should consider how much information is available, how credible it is given the circumstances, whether or not important allegations are corroborated, and what inferences can reasonably be drawn as a result. This assessment should include an examination of basic documents such as grants, cooperative agreements, loan authorizations, and contracts.

§26.405 Causes for suspension.

(a) Suspension may be imposed in accordance with the provisions of §§26.400 through 26.413 upon adequate evidence:

(1) To suspect the commission of an offense listed in §26.305(a); or

(2) That a cause for debarment under §26.305 may exist.

(b) Indictment shall constitute adequate evidence for purposes of suspension actions.

§26.410 Procedures.

(a) *Investigation and referral.* Information concerning the existence of a cause for suspension from any source shall be promptly reported, investigated, and referred, when appropriate, to the suspending official for consideration. After consideration, the suspending official may issue a notice of suspension.

(b) *Decisionmaking process.* Department of Commerce shall process suspension actions as informally as practicable, consistent with principles of fundamental fairness, using the procedures in §26.411 through §26.413.

§26.411 Notice of suspension.

When a respondent is suspended, notice shall immediately be given:

(a) That suspension has been imposed;

(b) That the suspension is based on an indictment, conviction, or other adequate evidence that the respondent has committed irregularities seriously reflecting on the propriety of further Federal Government dealings with the respondent;

(c) Describing any such irregularities in terms sufficient to put the respondent on notice without disclosing the Federal Government's evidence;

(d) Of the cause(s) relied upon under §26.405 for imposing suspension;

(e) That the suspension is for a temporary period pending the completion of an investigation or ensuing legal, debarment, or Program Fraud Civil Remedies Act proceedings;

(f) Of the provisions of §26.411 through §26.413 and any other Department of Commerce procedures, if applicable, governing suspension decisionmaking; and

(g) Of the effect of the suspension.

§26.412 Opportunity to contest suspension.

(a) *Submission in opposition.* Within 30 days after receipt of the notice of suspension, the respondent may submit, in person, in writing, or through a representative, information and argument in opposition to the suspension.

(b) *Additional proceedings as to disputed material facts.* (1) If the suspending official finds that the respondent's submission in opposition raises a genuine dispute over facts material to the suspension, respondent(s) shall be afforded an opportunity to appear with a representative, submit documentary

evidence, present witnesses, and confront any witness the agency presents, unless:

(i) The action is based on an indictment, conviction or civil judgment, or

(ii) A determination is made, on the basis of Department of Justice advice, that the substantial interests of the Federal Government in pending or contemplated legal proceedings based on the same facts as the suspension would be prejudiced.

(2) A transcribed record of any additional proceedings shall be prepared and made available at cost to the respondent, upon request, unless the respondent and the agency, by mutual agreement, waive the requirement for a transcript.

§ 26.413 Suspending official's decision.

The suspending official may modify or terminate the suspension (for example, see § 26.320(c) for reasons for reducing the period or scope of debarment) or may leave it in force. However, a decision to modify or terminate the suspension shall be without prejudice to the subsequent imposition of suspension by any other agency or debarment by any agency. The decision shall be rendered in accordance with the following provisions:

(a) *No additional proceedings necessary.* In actions: based on an indictment, conviction, or civil judgment; in which there is no genuine dispute over material facts; or in which additional proceedings to determine disputed material facts have been denied on the basis of Department of Justice advice, the suspending official shall make a decision on the basis of all the information in the administrative record, including any submission made by the respondent. The decision shall be made within 45 days after receipt of any information and argument submitted by the respondent, unless the suspending official extends this period for good cause.

(b) *Additional proceedings necessary.* (1) In actions in which additional proceedings are necessary to determine disputed material facts, written findings of fact shall be prepared. The suspending official shall base the decision on the facts as found, together with any information and argument submitted by the respondent and any other information in the administrative record.

(2) The suspending official may refer matters involving disputed material facts to another official for findings of fact. The suspending official may reject any such findings, in whole or in part, only after specifically determining them to be arbitrary or capricious or clearly erroneous.

(c) *Notice of suspending official's decision.* Prompt written notice of the suspending official's decision shall be sent to the respondent.

§ 26.415 Period of suspension.

(a) Suspension shall be for a temporary period pending the completion of an investigation or ensuing legal, debarment, or Program Fraud Civil Remedies Act proceedings, unless terminated sooner by the suspending official or as provided in paragraph (b) of this section.

(b) If legal or administrative proceedings are not initiated within 12 months after the date of the suspension notice, the suspension shall be terminated unless an Assistant Attorney General or United States Attorney requests its extension in writing, in which case it may be extended for an additional six months. In no event may a suspension extend beyond 18 months, unless such proceedings have been initiated within that period.

(c) The suspending official shall notify the Department of Justice of an impending termination of a suspension, at least 30 days before the 12-month period expires, to give that Department an opportunity to request an extension.

§ 26.420 Scope of suspension.

The scope of a suspension is the same as the scope of a debarment (see § 26.325), except that the procedures of §§ 26.410 through 26.413 shall be used in imposing a suspension.

Subpart E—Responsibilities of GSA, Agency and Participants

§ 26.500 GSA responsibilities.

(a) In accordance with the OMB guidelines, GSA shall compile, maintain, and distribute a list of all persons who have been debarred, suspended, or

voluntarily excluded by agencies under Executive Order 12549 and these regulations, and those who have been determined to be ineligible.

(b) At a minimum, this list shall indicate:

(1) The names and addresses of all debarred, suspended, ineligible, and voluntarily excluded persons, in alphabetical order, with cross-references when more than one name is involved in a single action;

(2) The type of action;

(3) The cause for the action;

(4) The scope of the action;

(5) Any termination date for each listing; and

(6) The agency and name and telephone number of the agency point of contact for the action.

§26.505 Department of Commerce responsibilities.

(a) The agency shall provide GSA with current information concerning debarments, suspension, determinations of ineligibility, and voluntary exclusions it has taken. Until February 18, 1989, the agency shall also provide GSA and OMB with information concerning all transactions in which Department of Commerce has granted exceptions under §26.215 permitting participation by debarred, suspended, or voluntarily excluded persons.

(b) Unless an alternative schedule is agreed to by GSA, the agency shall advise GSA of the information set forth in §26.500(b) and of the exceptions granted under §26.215 within five working days after taking such actions.

(c) The agency shall direct inquiries concerning listed persons to the agency that took the action.

(d) Agency officials shall check the Nonprocurement List before entering covered transactions to determine whether a participant in a primary transaction is debarred, suspended, ineligible, or voluntarily excluded (Tel. #).

(e) Agency officials shall check the Nonprocurement List before approving principals or lower tier participants where agency approval of the principal or lower tier participant is required under the terms of the transaction, to determine whether such principals or participants are debarred, suspended, ineligible, or voluntarily excluded.

§26.510 Participants' responsibilities.

(a) *Certification by participants in primary covered transactions.* Each participant shall submit the certification in Appendix A to this part for it and its principals at the time the participant submits its proposal in connection with a primary covered transaction, except that States need only complete such certification as to their principals. Participants may decide the method and frequency by which they determine the eligibility of their principals. In addition, each participant may, but is not required to, check the Nonprocurement List for its principals (Tel. #). Adverse information on the certification will not necessarily result in denial of participation. However, the certification, and any additional information pertaining to the certification submitted by the participant, shall be considered in the administration of covered transactions.

(b) *Certification by participants in lower tier covered transactions.* (1) Each participant shall require participants in lower tier covered transactions to include the certification in Appendix B to this part for it and its principals in any proposal submitted in connection with such lower tier covered transactions.

(2) A participant may rely upon the certification of a prospective participant in a lower tier covered transaction that it and its principals are not debarred, suspended, ineligible, or voluntarily excluded from the covered transaction by any Federal agency, unless it knows that the certification is erroneous. Participants may decide the method and frequency by which they determine the eligiblity of their principals. In addition, a participant may, but is not required to, check the Nonprocurement List for its principals and for participants (Tel. #).

(c) *Changed circumstances regarding certification.* A participant shall provide immediate written notice to Department of Commerce if at any time the participant learns that its certification was erroneous when submitted or has become erroneous by reason of changed circumstances. Participants in lower

tier covered transactions shall provide the same updated notice to the participant to which it submitted its proposals.

Subpart F—Drug-Free Workplace Requirements (Grants)

SOURCE: 55 FR 21688, 21693, May 25, 1990, unless otherwise noted.

§ 26.600 Purpose.

(a) The purpose of this subpart is to carry out the Drug-Free Workplace Act of 1988 by requiring that—

(1) A grantee, other than an individual, shall certify to the agency that it will provide a drug-free workplace;

(2) A grantee who is an individual shall certify to the agency that, as a condition of the grant, he or she will not engage in the unlawful manufacture, distribution, dispensing, possession or use of a controlled substance in conducting any activity with the grant.

(b) Requirements implementing the Drug-Free Workplace Act of 1988 for contractors with the agency are found at 48 CFR subparts 9.4, 23.5, and 52.2.

§ 26.605 Definitions.

(a) Except as amended in this section, the definitions of § 26.105 apply to this subpart.

(b) For purposes of this subpart—

(1) *Controlled substance* means a controlled substance in schedules I through V of the Controlled Substances Act (21 U.S.C. 812), and as further defined by regulation at 21 CFR 1308.11 through 1308.15;

(2) *Conviction* means a finding of guilt (including a plea of nolo contendere) or imposition of sentence, or both, by any judicial body charged with the responsibility to determine violations of the Federal or State criminal drug statutes;

(3) *Criminal drug statute* means a Federal or non-Federal criminal statute involving the manufacture, distribution, dispensing, use, or possession of any controlled substance;

(4) *Drug-free workplace* means a site for the performance of work done in connection with a specific grant at which employees of the grantee are prohibited from engaging in the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance;

(5) *Employee* means the employee of a grantee directly engaged in the performance of work under the grant, including:

(i) All *direct charge* employees;

(ii) All *indirect charge* employees, unless their impact or involvement is insignificant to the performance of the grant; and,

(iii) Temporary personnel and consultants who are directly engaged in the performance of work under the grant and who are on the grantee's payroll.

This definition does not include workers not on the payroll of the grantee (e.g., volunteers, even if used to meet a matching requirement; consultants or independent contractors not on the payroll; or employees of subrecipients or subcontractors in covered workplaces);

(6) *Federal agency* or *agency* means any United States executive department, military department, government corporation, government controlled corporation, any other establishment in the executive branch (including the Executive Office of the President), or any independent regulatory agency;

(7) *Grant* means an award of financial assistance, including a cooperative agreement, in the form of money, or property in lieu of money, by a Federal agency directly to a grantee. The term grant includes block grant and entitlement grant programs, whether or not exempted from coverage under the grants management government-wide common rule on uniform administrative requirements for grants and cooperative agreements. The term does not include technical assistance that provides services instead of money, or other assistance in the form of loans, loan guarantees, interest subsidies, insurance, or direct appropriations; or any veterans' benefits to individuals, i.e., any benefit to veterans, their families, or survivors by virtue of the service of a veteran in the Armed Forces of the United States;

(8) *Grantee* means a person who applies for or receives a grant directly

from a Federal agency (except another Federal agency);

(9) *Individual* means a natural person;

(10) *State* means any of the States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, or any agency of a State, exclusive of institutions of higher education, hospitals, and units of local government. A State instrumentality will be considered part of the State government if it has a written determination from a State government that such State considers the instrumentality to be an agency of the State government.

§26.610 Coverage.

(a) This subpart applies to any grantee of the agency.

(b) This subpart applies to any grant, except where application of this subpart would be inconsistent with the international obligations of the United States or the laws or regulations of a foreign government. A determination of such inconsistency may be made only by the agency head or his/her designee.

(c) The provisions of subparts A, B, C, D and E of this part apply to matters covered by this subpart, except where specifically modified by this subpart. In the event of any conflict between provisions of this subpart and other provisions of this part, the provisions of this subpart are deemed to control with respect to the implementation of drug-free workplace requirements concerning grants.

§26.615 Grounds for suspension of payments, suspension or termination of grants, or suspension or debarment.

A grantee shall be deemed in violation of the requirements of this subpart if the agency head or his or her official designee determines, in writing, that—

(a) The grantee has made a false certification under §26.630;

(b) With respect to a grantee other than an individual—

(1) The grantee has violated the certification by failing to carry out the requirements of paragraphs (A)(a)–(g) and/or (B) of the certification (Alternate I to Appendix C) or

(2) Such a number of employees of the grantee have been convicted of violations of criminal drug statutes for violations occurring in the workplace as to indicate that the grantee has failed to make a good faith effort to provide a drug-free workplace.

(c) With respect to a grantee who is an individual—

(1) The grantee has violated the certification by failing to carry out its requirements (Alternate II to Appendix C); or

(2) The grantee is convicted of a criminal drug offense resulting from a violation occurring during the conduct of any grant activity.

§26.620 Effect of violation.

(a) In the event of a violation of this subpart as provided in §26.615, and in accordance with applicable law, the grantee shall be subject to one or more of the following actions:

(1) Suspension of payments under the grant;

(2) Suspension or termination of the grant; and

(3) Suspension or debarment of the grantee under the provisions of this part.

(b) Upon issuance of any final decision under this part requiring debarment of a grantee, the debarred grantee shall be ineligible for award of any grant from any Federal agency for a period specified in the decision, not to exceed five years (*see* §26.320(a)(2) of this part).

§26.625 Exception provision.

The agency head may waive with respect to a particular grant, in writing, a suspension of payments under a grant, suspension or termination of a grant, or suspension or debarment of a grantee if the agency head determines that such a waiver would be in the public interest. This exception authority cannot be delegated to any other official.

§26.630 Certification requirements and procedures.

(a)(1) As a prior condition of being awarded a grant, each grantee shall make the appropriate certification to

the Federal agency providing the grant, as provided in Appendix C to this part.

(2) Grantees are not required to make a certification in order to continue receiving funds under a grant awarded before March 18, 1989, or under a no-cost time extension of such a grant. However, the grantee shall make a one-time drug-free workplace certification for a non-automatic continuation of such a grant made on or after March 18, 1989.

(b) Except as provided in this section, all grantees shall make the required certification for each grant. For mandatory formula grants and entitlements that have no application process, grantees shall submit a one-time certification in order to continue receiving awards.

(c) A grantee that is a State may elect to make one certification in each Federal fiscal year. States that previously submitted an annual certification are not required to make a certification for Fiscal Year 1990 until June 30, 1990. Except as provided in paragraph (d) of this section, this certification shall cover all grants to all State agencies from any Federal agency. The State shall retain the original of this statewide certification in its Governor's office and, prior to grant award, shall ensure that a copy is submitted individually with respect to each grant, unless the Federal agency has designated a central location for submission.

(1) The Office of Federal Assistance serves as the central location for submission of State and State agency certifications. Certifications should be sent to: Director, Office of Federal Assistance, HCHB Room 6204, Washington, DC 20230.

(2) [Reserved]

(d)(1) The Governor of a State may exclude certain State agencies from the statewide certification and authorize these agencies to submit their own certifications to Federal agencies. The statewide certification shall name any State agencies so excluded.

(2) A State agency to which the statewide certification does not apply, or a State agency in a State that does not have a statewide certification, may elect to make one certification in each Federal fiscal year. State agencies that previously submitted a State agency certification are not required to make a certification for Fiscal Year 1990 until June 30, 1990. The State agency shall retain the original of this State agency-wide certification in its central office and, prior to grant award, shall ensure that a copy is submitted individually with respect to each grant, unless the Federal agency designates a central location for submission.

(i) The Office of Federal Assistance serves as the central location for submission of State and State agency certifications. Certifications should be sent to: Director, Office of Federal Assistance, HCHB Room 6204, Washington, DC 20230.

(ii) [Reserved]

(3) When the work of a grant is done by more than one State agency, the certification of the State agency directly receiving the grant shall be deemed to certify compliance for all workplaces, including those located in other State agencies.

(e)(1) For a grant of less than 30 days performance duration, grantees shall have this policy statement and program in place as soon as possible, but in any case by a date prior to the date on which performance is expected to be completed.

(2) For a grant of 30 days or more performance duration, grantees shall have this policy statement and program in place within 30 days after award.

(3) Where extraordinary circumstances warrant for a specific grant, the grant officer may determine a different date on which the policy statement and program shall be in place.

[55 FR 21688, 21693, May 25, 1990]

§ 26.635 Reporting of and employee sanctions for convictions of criminal drug offenses.

(a) When a grantee other than an individual is notified that an employee has been convicted for a violation of a criminal drug statute occurring in the workplace, it shall take the following actions:

(1) Within 10 calendar days of receiving notice of the conviction, the grantee shall provide written notice, including the convicted employee's position

title, to every grant officer, or other designee on whose grant activity the convicted employee was working, unless a Federal agency has designated a central point for the receipt of such notifications. Notification shall include the identification number(s) for each of the Federal agency's affected grants.

(i) The Office of Federal Assistance serves as the central location for submission of notices of conviction. Notices should be sent to: Director, Office of Federal Assistance, HCHB Room 6204, Washington, DC 20230.

(2) Within 30 calendar days of receiving notice of the conviction, the grantee shall do the following with respect to the employee who was convicted.

(i) Take appropriate personnel action against the employee, up to and including termination, consistent with requirements of the Rehabilitation Act of 1973, as amended; or

(ii) Require the employee to participate satisfactorily in a drug abuse assistance or rehabilitation program approved for such purposes by a Federal, State, or local health, law enforcement, or other appropriate agency.

(b) A grantee who is an individual who is convicted for a violation of a criminal drug statute occurring during the conduct of any grant activity shall report the conviction, in writing, within 10 calendar days, to his or her Federal agency grant officer, or other designee, unless the Federal agency has designated a central point for the receipt of such notices. Notification shall include the identification number(s) for each of the Federal agency's affected grants.

(1) The Office of Federal Assistance serves as the central location for submission of notices of conviction. Notices should be sent to: Director, Office of Federal Assistance, HCHB Room 6204, Washington, DC 20230.

(2) [Reserved]

(Approved by the Office of Management and Budget under control number 0991–0002)

[55 FR 21688, 21693, May 25, 1990]

APPENDIX A TO PART 26—CERTIFICATION REGARDING DEBARMENT, SUSPENSION, AND OTHER RESPONSIBILITY MATTERS—PRIMARY COVERED TRANSACTIONS

Instructions for Certification

1. By signing and submitting this proposal, the prospective primary participant is providing the certification set out below.

2. The inability of a person to provide the certification required below will not necessarily result in denial of participation in this covered transaction. The prospective participant shall submit an explanation of why it cannot provide the certification set out below. The certification or explanation will be considered in connection with the department or agency's determination whether to enter into this transaction. However, failure of the prospective primary participant to furnish a certification or an explanation shall disqualify such person from participation in this transaction.

3. The certification in this clause is a material representation of fact upon which reliance was placed when the department or agency determined to enter into this transaction. If it is later determined that the prospective primary participant knowingly rendered an erroneous certification, in addition to other remedies available to the Federal Government, the department or agency may terminate this transaction for cause or default.

4. The prospective primary participant shall provide immediate written notice to the department or agency to which this proposal is submitted if at any time the prospective primary participant learns that its certification was erroneous when submitted or has become erroneous by reason of changed circumstances.

5. The terms *covered transaction, debarred, suspended, ineligible, lower tier covered transaction, participant, person, primary covered transaction, principal, proposal, and voluntarily excluded,* as used in this clause, have the meanings set out in the Definitions and Coverage sections of the rules implementing Executive Order 12549. You may contact the department or agency to which this proposal is being submitted for assistance in obtaining a copy of those regulations.

6. The prospective primary participant agrees by submitting this proposal that, should the proposed covered transaction be entered into, it shall not knowingly enter into any lower tier covered transaction with a person who is proposed for debarment under 48 CFR part 9, subpart 9.4, debarred, suspended, declared ineligible, or voluntarily

excluded from participation in this covered transaction, unless authorized by the department or agency entering into this transaction.

7. The prospective primary participant further agrees by submitting this proposal that it will include the clause titled ''Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion-Lower Tier Covered Transaction,'' provided by the department or agency entering into this covered transaction, without modification, in all lower tier covered transactions and in all solicitations for lower tier covered transactions.

8. A participant in a covered transaction may rely upon a certification of a prospective participant in a lower tier covered transaction that it is not proposed for debarment under 48 CFR part 9, subpart 9.4, debarred, suspended, ineligible, or voluntarily excluded from the covered transaction, unless it knows that the certification is erroneous. A participant may decide the method and frequency by which it determines the eligibility of its principals. Each participant may, but is not required to, check the List of Parties Excluded from Federal Procurement and Nonprocurement Programs.

9. Nothing contained in the foregoing shall be construed to require establishment of a system of records in order to render in good faith the certification required by this clause. The knowledge and information of a participant is not required to exceed that which is normally possessed by a prudent person in the ordinary course of business dealings.

10. Except for transactions authorized under paragraph 6 of these instructions, if a participant in a covered transaction knowingly enters into a lower tier covered transaction with a person who is proposed for debarment under 48 CFR part 9, subpart 9.4, suspended, debarred, ineligible, or voluntarily excluded from participation in this transaction, in addition to other remedies available to the Federal Government, the department or agency may terminate this transaction for cause or default.

Certification Regarding Debarment, Suspension, and Other Responsibility Matters—Primary Covered Transactions

(1) The prospective primary participant certifies to the best of its knowledge and belief, that it and its principals:

(a) Are not presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded by any Federal department or agency;

(b) Have not within a three-year period preceding this proposal been convicted of or had a civil judgment rendered against them for commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (Federal, State or local) transaction or contract under a public transaction; violation of Federal or State antitrust statutes or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property;

(c) Are not presently indicted for or otherwise criminally or civilly charged by a governmental entity (Federal, State or local) with commission of any of the offenses enumerated in paragraph (1)(b) of this certification; and

(d) Have not within a three-year period preceding this application/proposal had one or more public transactions (Federal, State or local) terminated for cause or default.

(2) Where the prospective primary participant is unable to certify to any of the statements in this certification, such prospective participant shall attach an explanation to this proposal.

[60 FR 33042, 33044, June 26, 1995]

APPENDIX B TO PART 26—CERTIFICATION REGARDING DEBARMENT, SUSPENSION, INELIGIBILITY AND VOLUNTARY EXCLUSION—LOWER TIER COVERED TRANSACTIONS

Instructions for Certification

1. By signing and submitting this proposal, the prospective lower tier participant is providing the certification set out below.

2. The certification in this clause is a material representation of fact upon which reliance was placed when this transaction was entered into. If it is later determined that the prospective lower tier participant knowingly rendered an erroneous certification, in addition to other remedies available to the Federal Government the department or agency with which this transaction originated may pursue available remedies, including suspension and/or debarment.

3. The prospective lower tier participant shall provide immediate written notice to the person to which this proposal is submitted if at any time the prospective lower tier participant learns that its certification was erroneous when submitted or had become erroneous by reason of changed circumstances.

4. The terms *covered transaction, debarred, suspended, ineligible, lower tier covered transaction, participant, person, primary covered transaction, principal, proposal,* and *voluntarily excluded,* as used in this clause, have the meaning set out in the Definitions and Coverage sections of rules implementing Executive Order 12549. You may contact the person to which this proposal is submitted for assistance in obtaining a copy of those regulations.

5. The prospective lower tier participant agrees by submitting this proposal that,

should the proposed covered transaction be entered into, it shall not knowingly enter into any lower tier covered transaction with a person who is proposed for debarment under 48 CFR part 9, subpart 9.4, debarred, suspended, declared ineligible, or voluntarily excluded from participation in this covered transaction, unless authorized by the department or agency with which this transaction originated.

6. The prospective lower tier participant further agrees by submitting this proposal that it will include this clause titled ''Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion-Lower Tier Covered Transaction,'' without modification, in all lower tier covered transactions and in all solicitations for lower tier covered transactions.

7. A participant in a covered transaction may rely upon a certification of a prospective participant in a lower tier covered transaction that it is not proposed for debarment under 48 CFR part 9, subpart 9.4, debarred, suspended, ineligible, or voluntarily excluded from covered transactions, unless it knows that the certification is erroneous. A participant may decide the method and frequency by which it determines the eligibility of its principals. Each participant may, but is not required to, check the List of Parties Excluded from Federal Procurement and Nonprocurement Programs.

8. Nothing contained in the foregoing shall be construed to require establishment of a system of records in order to render in good faith the certification required by this clause. The knowledge and information of a participant is not required to exceed that which is normally possessed by a prudent person in the ordinary course of business dealings.

9. Except for transactions authorized under paragraph 5 of these instructions, if a participant in a covered transaction knowingly enters into a lower tier covered transaction with a person who is proposed for debarment under 48 CFR part 9, subpart 9.4, suspended, debarred, ineligible, or voluntarily excluded from participation in this transaction, in addition to other remedies available to the Federal Government, the department or agency with which this transaction originated may pursue available remedies, including suspension and/or debarment.

Certification Regarding Debarment, Suspension, Ineligibility an Voluntary Exclusion—Lower Tier Covered Transactions

(1) The prospective lower tier participant certifies, by submission of this proposal, that neither it nor its principals is presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from participation in this transaction by any Federal department or agency.

(2) Where the prospective lower tier participant is unable to certify to any of the statements in this certification, such prospective participant shall attach an explanation to this proposal.

[60 FR 33042, 33044, June 26, 1995]

APPENDIX C TO PART 26—CERTIFICATION REGARDING DRUG-FREE WORKPLACE REQUIREMENTS

Instructions for Certification

1. By signing and/or submitting this application or grant agreement, the grantee is providing the certification set out below.

2. The certification set out below is a material representation of fact upon which reliance is placed when the agency awards the grant. If it is later determined that the grantee knowingly rendered a false certification, or otherwise violates the requirements of the Drug-Free Workplace Act, the agency, in addition to any other remedies available to the Federal Government, may take action authorized under the Drug-Free Workplace Act.

3. For grantees other than individuals, Alternate I applies.

4. For grantees who are individuals, Alternate II applies.

5. Workplaces under grants, for grantees other than individuals, need not be identified on the certification. If known, they may be identified in the grant application. If the grantee does not identify the workplaces at the time of application, or upon award, if there is no application, the grantee must keep the identity of the workplace(s) on file in its office and make the information available for Federal inspection. Failure to identify all known workplaces constitutes a violation of the grantee's drug-free workplace requirements.

6. Workplace identifications must include the actual address of buildings (or parts of buildings) or other sites where work under the grant takes place. Categorical descriptions may be used (e.g., all vehicles of a mass transit authority or State highway department while in operation, State employees in each local unemployment office, performers in concert halls or radio studios).

7. If the workplace identified to the agency changes during the performance of the grant, the grantee shall inform the agency of the change(s), if it previously identified the workplaces in question (see paragraph five).

8. Definitions of terms in the Nonprocurement Suspension and Debarment common rule and Drug-Free Workplace common rule apply to this certification. Grantees' attention is called, in particular, to the following definitions from these rules:

Controlled substance means a controlled substance in Schedules I through V of the Controlled Substances Act (21 U.S.C. 812) and

as further defined by regulation (21 CFR 1308.11 through 1308.15);

Conviction means a finding of guilt (including a plea of nolo contendere) or imposition of sentence, or both, by any judicial body charged with the responsibility to determine violations of the Federal or State criminal drug statutes;

Criminal drug statute means a Federal or non-Federal criminal statute involving the manufacture, distribution, dispensing, use, or possession of any controlled substance;

Employee means the employee of a grantee directly engaged in the performance of work under a grant, including: (i) All *direct charge* employees; (ii) All *indirect charge* employees unless their impact or involvement is insignificant to the performance of the grant; and, (iii) Temporary personnel and consultants who are directly engaged in the performance of work under the grant and who are on the grantee's payroll. This definition does not include workers not on the payroll of the grantee (e.g., volunteers, even if used to meet a matching requirement; consultants or independent contractors not on the grantee's payroll; or employees of subrecipients or subcontractors in covered workplaces).

Certification Regarding Drug-Free Workplace Requirements

Alternate I. (Grantees Other Than Individuals)

A. The grantee certifies that it will or will continue to provide a drug-free workplace by:

(a) Publishing a statement notifying employees that the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance is prohibited in the grantee's workplace and specifying the actions that will be taken against employees for violation of such prohibition;

(b) Establishing an ongoing drug-free awareness program to inform employees about—

(1) The dangers of drug abuse in the workplace;

(2) The grantee's policy of maintaining a drug-free workplace;

(3) Any available drug counseling, rehabilitation, and employee assistance programs; and

(4) The penalties that may be imposed upon employees for drug abuse violations occurring in the workplace;

(c) Making it a requirement that each employee to be engaged in the performance of the grant be given a copy of the statement required by paragraph (a);

(d) Notifying the employee in the statement required by paragraph (a) that, as a condition of employment under the grant, the employee will—

(1) Abide by the terms of the statement; and

(2) Notify the employer in writing of his or her conviction for a violation of a criminal drug statute occurring in the workplace no later than five calendar days after such conviction;

(e) Notifying the agency in writing, within ten calendar days after receiving notice under paragraph (d)(2) from an employee or otherwise receiving actual notice of such conviction. Employers of convicted employees must provide notice, including position title, to every grant officer or other designee on whose grant activity the convicted employee was working, unless the Federal agency has designated a central point for the receipt of such notices. Notice shall include the identification number(s) of each affected grant;

(f) Taking one of the following actions, within 30 calendar days of receiving notice under paragraph (d)(2), with respect to any employee who is so convicted—

(1) Taking appropriate personnel action against such an employee, up to and including termination, consistent with the requirements of the Rehabilitation Act of 1973, as amended; or

(2) Requiring such employee to participate satisfactorily in a drug abuse assistance or rehabilitation program approved for such purposes by a Federal, State, or local health, law enforcement, or other appropriate agency;

(g) Making a good faith effort to continue to maintain a drug-free workplace through implementation of paragraphs (a), (b), (c), (d), (e) and (f).

B. The grantee may insert in the space provided below the site(s) for the performance of work done in connection with the specific grant:

Place of Performance (Street address, city, county, state, zip code)

_____

_____

_____

Check ☐ if there are workplaces on file that are not identified here.

Alternate II. (Grantees Who Are Individuals)

(a) The grantee certifies that, as a condition of the grant, he or she will not engage in the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance in conducting any activity with the grant;

(b) If convicted of a criminal drug offense resulting from a violation occurring during the conduct of any grant activity, he or she will report the conviction, in writing, within 10 calendar days of the conviction, to every grant officer or other designee, unless the Federal agency designates a central point for

the receipt of such notices. When notice is made to such a central point, it shall include the identification number(s) of each affected grant.

[55 FR 21690, 21693, May 25, 1990]

PART 27—PROTECTION OF HUMAN SUBJECTS

Sec.

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AUTHORITY: 5 U.S.C. 301; 42 U.S.C. 300v–1(b).

SOURCE: 56 FR 28012 and 28019, June 18, 1991, unless otherwise noted.

§27.101 To what does this policy apply?

(a) Except as provided in paragraph (b) of this section, this policy applies to all research involving human subjects conducted, supported or otherwise subject to regulation by any federal department or agency which takes appropriate administrative action to make the policy applicable to such research. This includes research conducted by federal civilian employees or military personnel, except that each department or agency head may adopt such procedural modifications as may be appropriate from an administrative standpoint. It also includes research conducted, supported, or otherwise subject to regulation by the federal government outside the United States.

(1) Research that is conducted or supported by a federal department or agency, whether or not it is regulated as defined in §27.102(e), must comply with all sections of this policy.

(2) Research that is neither conducted nor supported by a federal department or agency but is subject to regulation as defined in §27.102(e) must be reviewed and approved, in compliance with §27.101, §27.102, and §27.107 through §27.117 of this policy, by an institutional review board (IRB) that operates in accordance with the pertinent requirements of this policy.

(b) Unless otherwise required by department or agency heads, research activities in which the only involvement of human subjects will be in one or more of the following categories are exempt from this policy:

(1) Research conducted in established or commonly accepted educational settings, involving normal educational practices, such as (i) research on regular and special education instructional strategies, or (ii) research on the effectiveness of or the comparison among instructional techniques, curricula, or classroom management methods.

(2) Research involving the use of educational tests (cognitive, diagnostic, aptitude, achievement), survey procedures, interview procedures or observation of public behavior, unless:

(i) Information obtained is recorded in such a manner that human subjects can be identified, directly or through identifiers linked to the subjects; and (ii) any disclosure of the human subjects' responses outside the research could reasonably place the subjects at risk of criminal or civil liability or be damaging to the subjects' financial standing, employability, or reputation.

(3) Research involving the use of educational tests (cognitive, diagnostic, aptitude, achievement), survey procedures, interview procedures, or observation of public behavior that is not

exempt under paragraph (b)(2) of this section, if:

(i) The human subjects are elected or appointed public officials or candidates for public office; or (ii) federal statute(s) require(s) without exception that the confidentiality of the personally identifiable information will be maintained throughout the research and thereafter.

(4) Research, involving the collection or study of existing data, documents, records, pathological specimens, or diagnostic specimens, if these sources are publicly available or if the information is recorded by the investigator in such a manner that subjects cannot be identified, directly or through identifiers linked to the subjects.

(5) Research and demonstration projects which are conducted by or subject to the approval of department or agency heads, and which are designed to study, evaluate, or otherwise examine:

(i) Public benefit or service programs; (ii) procedures for obtaining benefits or services under those programs; (iii) possible changes in or alternatives to those programs or procedures; or (iv) possible changes in methods or levels of payment for benefits or services under those programs.

(6) Taste and food quality evaluation and consumer acceptance studies, (i) if wholesome foods without additives are consumed or (ii) if a food is consumed that contains a food ingredient at or below the level and for a use found to be safe, or agricultural chemical or environmental contaminant at or below the level found to be safe, by the Food and Drug Administration or approved by the Environmental Protection Agency or the Food Safety and Inspection Service of the U.S. Department of Agriculture.

(c) Department or agency heads retain final judgment as to whether a particular activity is covered by this policy.

(d) Department or agency heads may require that specific research activities or classes of research activities conducted, supported, or otherwise subject to regulation by the department or agency but not otherwise covered by this policy, comply with some or all of the requirements of this policy.

(e) Compliance with this policy requires compliance with pertinent federal laws or regulations which provide additional protections for human subjects.

(f) This policy does not affect any state or local laws or regulations which may otherwise be applicable and which provide additional protections for human subjects.

(g) This policy does not affect any foreign laws or regulations which may otherwise be applicable and which provide additional protections to human subjects of research.

(h) When research covered by this policy takes place in foreign countries, procedures normally followed in the foreign countries to protect human subjects may differ from those set forth in this policy. [An example is a foreign institution which complies with guidelines consistent with the World Medical Assembly Declaration (Declaration of Helsinki amended 1989) issued either by sovereign states or by an organization whose function for the protection of human research subjects is internationally recognized.] In these circumstances, if a department or agency head determines that the procedures prescribed by the institution afford protections that are at least equivalent to those provided in this policy, the department or agency head may approve the substitution of the foreign procedures in lieu of the procedural requirements provided in this policy. Except when otherwise required by statute, Executive Order, or the department or agency head, notices of these actions as they occur will be published in the FEDERAL REGISTER or will be otherwise published as provided in department or agency procedures.

(i) Unless otherwise required by law, department or agency heads may waive the applicability of some or all of the provisions of this policy to specific research activities or classes of research activities otherwise covered by this policy. Except when otherwise required by statute or Executive Order, the department or agency head shall forward advance notices of these actions to the Office for Protection from Research Risks, Department of Health and Human Services (HHS), and shall also publish them in the FEDERAL REGISTER

or in such other manner as provided in department or agency procedures.[1]

[56 FR 28012 and 28019, June 18, 1991, 56 FR 29756, June 28, 1991]

§27.102 Definitions.

(a) *Department or agency head* means the head of any federal department or agency and any other officer or employee of any department or agency to whom authority has been delegated.

(b) *Institution* means any public or private entity or agency (including federal, state, and other agencies).

(c) *Legally authorized representative* means an individual or judicial or other body authorized under applicable law to consent on behalf of a prospective subject to the subject's participation in the procedure(s) involved in the research.

(d) *Research* means a systematic investigation, including research development, testing and evaluation, designed to develop or contribute to generalizable knowledge. Activities which meet this definition constitute research for purposes of this policy, whether or not they are conducted or supported under a program which is considered research for other purposes. For example, some demonstration and service programs may include research activities.

(e) *Research subject to regulation*, and similar terms are intended to encompass those research activities for which a federal department or agency has specific responsibility for regulating as a research activity, (for example, Investigational New Drug requirements administered by the Food and Drug Administration). It does not include research activities which are incidentally regulated by a federal department or agency solely as part of the department's or agency's broader responsibility to regulate certain types of activities whether research or non-research in nature (for example, Wage and Hour requirements administered by the Department of Labor).

(f) *Human subject* means a living individual about whom an investigator (whether professional or student) conducting research obtains

(1) data through intervention or interaction with the individual, or

(2) identifiable private information.

Intervention includes both physical procedures by which data are gathered (for example, venipuncture) and manipulations of the subject or the subject's environment that are performed for research purposes. Interaction includes communication or interpersonal contact between investigator and subject. ''Private information'' includes information about behavior that occurs in a context in which an individual can reasonably expect that no observation or recording is taking place, and information which has been provided for specific purposes by an individual and which the individual can reasonably expect will not be made public (for example, a medical record). Private information must be individually identifiable (i.e., the identity of the subject is or may readily be ascertained by the investigator or associated with the information) in order for obtaining the information to constitute research involving human subjects.

(g) *IRB* means an institutional review board established in accord with and for the purposes expressed in this policy.

(h) *IRB approval* means the determination of the IRB that the research has been reviewed and may be conducted at an institution within the constraints set forth by the IRB and by other institutional and federal requirements.

(i) *Minimal risk* means that the probability and magnitude of harm or discomfort anticipated in the research are not greater in and of themselves than those ordinarily encountered in daily

[1] Institutions with HHS-approved assurances on file will abide by provisions of title 45 CFR part 46 subparts A–D. Some of the other Departments and Agencies have incorporated all provisions of title 45 CFR part 46 into their policies and procedures as well. However, the exemptions at 45 CFR part 46.101(b) do not apply to research involving prisoners, fetuses, pregnant women, or human in vitro fertilization, subparts B and C. The exemption at 45 CFR part 46.101(b)(2), for research involving survey or interview procedures or observation of public behavior, does not apply to research with children, subpart D, except for research involving observations of public behavior when the investigator(s) do not participate in the activities being observed.

life or during the performance of routine physical or psychological examinations or tests.

(j) *Certification* means the official notification by the institution to the supporting department or agency, in accordance with the requirements of this policy, that a research project or activity involving human subjects has been reviewed and approved by an IRB in accordance with an approved assurance.

§ 27.103 Assuring compliance with this policy—research conducted or supported by any Federal Department or Agency.

(a) Each institution engaged in research which is covered by this policy and which is conducted or supported by a federal department or agency shall provide written assurance satisfactory to the department or agency head that it will comply with the requirements set forth in this policy. In lieu of requiring submission of an assurance, individual department or agency heads shall accept the existence of a current assurance, appropriate for the research in question, on file with the Office for Protection from Research Risks, HHS, and approved for federalwide use by that office. When the existence of an HHS-approved assurance is accepted in lieu of requiring submission of an assurance, reports (except certification) required by this policy to be made to department and agency heads shall also be made to the Office for Protection from Research Risks, HHS.

(b) Departments and agencies will conduct or support research covered by this policy only if the institution has an assurance approved as provided in this section, and only if the institution has certified to the department or agency head that the research has been reviewed and approved by an IRB provided for in the assurance, and will be subject to continuing review by the IRB. Assurances applicable to federally supported or conducted research shall at a minimum include:

(1) A statement of principles governing the institution in the discharge of its responsibilities for protecting the rights and welfare of human subjects of research conducted at or sponsored by the institution, regardless of whether the research is subject to federal regulation. This may include an appropriate existing code, declaration, or statement of ethical principles, or a statement formulated by the institution itself. This requirement does not preempt provisions of this policy applicable to department- or agency-supported or regulated research and need not be applicable to any research exempted or waived under § 27.101 (b) or (i).

(2) Designation of one or more IRBs established in accordance with the requirements of this policy, and for which provisions are made for meeting space and sufficient staff to support the IRB's review and recordkeeping duties.

(3) A list of IRB members identified by name; earned degrees; representative capacity; indications of experience such as board certifications, licenses, etc., sufficient to describe each member's chief anticipated contributions to IRB deliberations; and any employment or other relationship between each member and the institution; for example: full-time employee, part-time employee, member of governing panel or board, stockholder, paid or unpaid consultant. Changes in IRB membership shall be reported to the department or agency head, unless in accord with § 27.103(a) of this policy, the existence of an HHS-approved assurance is accepted. In this case, change in IRB membership shall be reported to the Office for Protection from Research Risks, HHS.

(4) Written procedures which the IRB will follow (i) for conducting its initial and continuing review of research and for reporting its findings and actions to the investigator and the institution; (ii) for determining which projects require review more often than annually and which projects need verification from sources other than the investigators that no material changes have occurred since previous IRB review; and (iii) for ensuring prompt reporting to the IRB of proposed changes in a research activity, and for ensuring that such changes in approved research, during the period for which IRB approval has already been given, may not be initiated without IRB review and approval except when necessary to

eliminate apparent immediate hazards to the subject.

(5) Written procedures for ensuring prompt reporting to the IRB, appropriate institutional officials, and the department or agency head of (i) any unanticipated problems involving risks to subjects or others or any serious or continuing noncompliance with this policy or the requirements or determinations of the IRB and (ii) any suspension or termination of IRB approval.

(c) The assurance shall be executed by an individual authorized to act for the institution and to assume on behalf of the institution the obligations imposed by this policy and shall be filed in such form and manner as the department or agency head prescribes.

(d) The department or agency head will evaluate all assurances submitted in accordance with this policy through such officers and employees of the department or agency and such experts or consultants engaged for this purpose as the department or agency head determines to be appropriate. The department or agency head's evaluation will take into consideration the adequacy of the proposed IRB in light of the anticipated scope of the institution's research activities and the types of subject populations likely to be involved, the appropriateness of the proposed initial and continuing review procedures in light of the probable risks, and the size and complexity of the institution.

(e) On the basis of this evaluation, the department or agency head may approve or disapprove the assurance, or enter into negotiations to develop an approvable one. The department or agency head may limit the period during which any particular approved assurance or class of approved assurances shall remain effective or otherwise condition or restrict approval.

(f) Certification is required when the research is supported by a federal department or agency and not otherwise exempted or waived under §27.101 (b) or (i). An institution with an approved assurance shall certify that each application or proposal for research covered by the assurance and by §27.103 of this Policy has been reviewed and approved by the IRB. Such certification must be submitted with the application or proposal or by such later date as may be prescribed by the department or agency to which the application or proposal is submitted. Under no condition shall research covered by §27.103 of the Policy be supported prior to receipt of the certification that the research has been reviewed and approved by the IRB. Institutions without an approved assurance covering the research shall certify within 30 days after receipt of a request for such a certification from the department or agency, that the application or proposal has been approved by the IRB. If the certification is not submitted within these time limits, the application or proposal may be returned to the institution.

(Approved by the Office of Management and Budget under Control Number 9999–0020)

[56 FR 28012 and 28019, June 18, 1991, 56 FR 29756, June 28, 1991]

§§27.104—27.106 [Reserved]

§27.107 IRB membership.

(a) Each IRB shall have at least five members, with varying backgrounds to promote complete and adequate review of research activities commonly conducted by the institution. The IRB shall be sufficiently qualified through the experience and expertise of its members, and the diversity of the members, including consideration of race, gender, and cultural backgrounds and sensitivity to such issues as community attitudes, to promote respect for its advice and counsel in safeguarding the rights and welfare of human subjects. In addition to possessing the professional competence necessary to review specific research activities, the IRB shall be able to ascertain the acceptability of proposed research in terms of institutional commitments and regulations, applicable law, and standards of professional conduct and practice. The IRB shall therefore include persons knowledgeable in these areas. If an IRB regularly reviews research that involves a vulnerable category of subjects, such as children, prisoners, pregnant women, or handicapped or mentally disabled persons, consideration shall be given to the inclusion of one or more individuals who

are knowledgeable about and experienced in working with these subjects.

(b) Every nondiscriminatory effort will be made to ensure that no IRB consists entirely of men or entirely of women, including the institution's consideration of qualified persons of both sexes, so long as no selection is made to the IRB on the basis of gender. No IRB may consist entirely of members of one profession.

(c) Each IRB shall include at least one member whose primary concerns are in scientific areas and at least one member whose primary concerns are in nonscientific areas.

(d) Each IRB shall include at least one member who is not otherwise affiliated with the institution and who is not part of the immediate family of a person who is affiliated with the institution.

(e) No IRB may have a member participate in the IRB's initial or continuing review of any project in which the member has a conflicting interest, except to provide information requested by the IRB.

(f) An IRB may, in its discretion, invite individuals with competence in special areas to assist in the review of issues which require expertise beyond or in addition to that available on the IRB. These individuals may not vote with the IRB.

§ 27.108 IRB functions and operations.

In order to fulfill the requirements of this policy each IRB shall:

(a) Follow written procedures in the same detail as described in § 27.103(b)(4) and, to the extent required by, § 27.103(b)(5).

(b) Except when an expedited review procedure is used (see § 27.110), review proposed research at convened meetings at which a majority of the members of the IRB are present, including at least one member whose primary concerns are in nonscientific areas. In order for the research to be approved, it shall receive the approval of a majority of those members present at the meeting.

§ 27.109 IRB review of research.

(a) An IRB shall review and have authority to approve, require modifications in (to secure approval), or disapprove all research activities covered by this policy.

(b) An IRB shall require that information given to subjects as part of informed consent is in accordance with § 27.116. The IRB may require that information, in addition to that specifically mentioned in § 27.116, be given to the subjects when in the IRB's judgment the information would meaningfully add to the protection of the rights and welfare of subjects.

(c) An IRB shall require documentation of informed consent or may waive documentation in accordance with § 27.117.

(d) An IRB shall notify investigators and the institution in writing of its decision to approve or disapprove the proposed research activity, or of modifications required to secure IRB approval of the research activity. If the IRB decides to disapprove a research activity, it shall include in its written notification a statement of the reasons for its decision and give the investigator an opportunity to respond in person or in writing.

(e) An IRB shall conduct continuing review of research covered by this policy at intervals appropriate to the degree of risk, but not less than once per year, and shall have authority to observe or have a third party observe the consent process and the research.

(Approved by the Office of Management and Budget under Control Number 9999–0020)

§ 27.110 Expedited review procedures for certain kinds of research involving no more than minimal risk, and for minor changes in approved research.

(a) The Secretary, HHS, has established, and published as a Notice in the FEDERAL REGISTER, a list of categories of research that may be reviewed by the IRB through an expedited review procedure. The list will be amended, as appropriate after consultation with other departments and agencies, through periodic republication by the Secretary, HHS, in the FEDERAL REGISTER. A copy of the list is available from the Office for Protection from Research Risks, National Institutes of Health, HHS, Bethesda, Maryland 20892.

(b) An IRB may use the expedited review procedure to review either or both of the following:

(1) Some or all of the research appearing on the list and found by the reviewer(s) to involve no more than minimal risk,

(2) Minor changes in previously approved research during the period (of one year or less) for which approval is authorized.

Under an expedited review procedure, the review may be carried out by the IRB chairperson or by one or more experienced reviewers designated by the chairperson from among members of the IRB. In reviewing the research, the reviewers may exercise all of the authorities of the IRB except that the reviewers may not disapprove the research. A research activity may be disapproved only after review in accordance with the non-expedited procedure set forth in §27.108(b).

(c) Each IRB which uses an expedited review procedure shall adopt a method for keeping all members advised of research proposals which have been approved under the procedure.

(d) The department or agency head may restrict, suspend, terminate, or choose not to authorize an institution's or IRB's use of the expedited review procedure.

§27.111 Criteria for IRB approval of research.

(a) In order to approve research covered by this policy the IRB shall determine that all of the following requirements are satisfied:

(1) Risks to subjects are minimized: (i) By using procedures which are consistent with sound research design and which do not unnecessarily expose subjects to risk, and (ii) whenever appropriate, by using procedures already being performed on the subjects for diagnostic or treatment purposes.

(2) Risks to subjects are reasonable in relation to anticipated benefits, if any, to subjects, and the importance of the knowledge that may reasonably be expected to result. In evaluating risks and benefits, the IRB should consider only those risks and benefits that may result from the research (as distinguished from risks and benefits of therapies subjects would receive even if not participating in the research). The IRB should not consider possible long-range effects of applying knowledge gained in the research (for example, the possible effects of the research on public policy) as among those research risks that fall within the purview of its responsibility.

(3) Selection of subjects is equitable. In making this assessment the IRB should take into account the purposes of the research and the setting in which the research will be conducted and should be particularly cognizant of the special problems of research involving vulnerable populations, such as children, prisoners, pregnant women, mentally disabled persons, or economically or educationally disadvantaged persons.

(4) Informed consent will be sought from each prospective subject or the subject's legally authorized representative, in accordance with, and to the extent required by §27.116.

(5) Informed consent will be appropriately documented, in accordance with, and to the extent required by §27.117.

(6) When appropriate, the research plan makes adequate provision for monitoring the data collected to ensure the safety of subjects.

(7) When appropriate, there are adequate provisions to protect the privacy of subjects and to maintain the confidentiality of data.

(b) When some or all of the subjects are likely to be vulnerable to coercion or undue influence, such as children, prisoners, pregnant women, mentally disabled persons, or economically or educationally disadvantaged persons, additional safeguards have been included in the study to protect the rights and welfare of these subjects.

§27.112 Review by institution.

Research covered by this policy that has been approved by an IRB may be subject to further appropriate review and approval or disapproval by officials of the institution. However, those officials may not approve the research if it has not been approved by an IRB.

§ 27.113 Suspension or termination of IRB approval of research.

An IRB shall have authority to suspend or terminate approval of research that is not being conducted in accordance with the IRB's requirements or that has been associated with unexpected serious harm to subjects. Any suspension or termination of approval shall include a statement of the reasons for the IRB's action and shall be reported promptly to the investigator, appropriate institutional officials, and the department or agency head.

(Approved by the Office of Management and Budget under Control Number 9999–0020)

§ 27.114 Cooperative research.

Cooperative research projects are those projects covered by this policy which involve more than one institution. In the conduct of cooperative research projects, each institution is responsible for safeguarding the rights and welfare of human subjects and for complying with this policy. With the approval of the department or agency head, an institution participating in a cooperative project may enter into a joint review arrangement, rely upon the review of another qualified IRB, or make similar arrangements for avoiding duplication of effort.

§ 27.115 IRB records.

(a) An institution, or when appropriate an IRB, shall prepare and maintain adequate documentation of IRB activities, including the following:

(1) Copies of all research proposals reviewed, scientific evaluations, if any, that accompany the proposals, approved sample consent documents, progress reports submitted by investigators, and reports of injuries to subjects.

(2) Minutes of IRB meetings which shall be in sufficient detail to show attendance at the meetings; actions taken by the IRB; the vote on these actions including the number of members voting for, against, and abstaining; the basis for requiring changes in or disapproving research; and a written summary of the discussion of controverted issues and their resolution.

(3) Records of continuing review activities.

(4) Copies of all correspondence between the IRB and the investigators.

(5) A list of IRB members in the same detail as described is § 27.103(b)(3).

(6) Written procedures for the IRB in the same detail as described in § 27.103(b)(4) and § 27.103(b)(5).

(7) Statements of significant new findings provided to subjects, as required by § 27.116(b)(5).

(b) The records required by this policy shall be retained for at least 3 years, and records relating to research which is conducted shall be retained for at least 3 years after completion of the research. All records shall be accessible for inspection and copying by authorized representatives of the department or agency at reasonable times and in a reasonable manner.

(Approved by the Office of Management and Budget under Control Number 9999–0020)

§ 27.116 General requirements for informed consent.

Except as provided elsewhere in this policy, no investigator may involve a human being as a subject in research covered by this policy unless the investigator has obtained the legally effective informed consent of the subject or the subject's legally authorized representative. An investigator shall seek such consent only under circumstances that provide the prospective subject or the representative sufficient opportunity to consider whether or not to participate and that minimize the possibility of coercion or undue influence. The information that is given to the subject or the representative shall be in language understandable to the subject or the representative. No informed consent, whether oral or written, may include any exculpatory language through which the subject or the representative is made to waive or appear to waive any of the subject's legal rights, or releases or appears to release the investigator, the sponsor, the institution or its agents from liability for negligence.

(a) Basic elements of informed consent. Except as provided in paragraph (c) or (d) of this section, in seeking informed consent the following information shall be provided to each subject:

(1) A statement that the study involves research, an explanation of the purposes of the research and the expected duration of the subject's participation, a description of the procedures to be followed, and identification of any procedures which are experimental;

(2) A description of any reasonably foreseeable risks or discomforts to the subject;

(3) A description of any benefits to the subject or to others which may reasonably be expected from the research;

(4) A disclosure of appropriate alternative procedures or courses of treatment, if any, that might be advantageous to the subject;

(5) A statement describing the extent, if any, to which confidentiality of records identifying the subject will be maintained;

(6) For research involving more than minimal risk, an explanation as to whether any compensation and an explanation as to whether any medical treatments are available if injury occurs and, if so, what they consist of, or where further information may be obtained;

(7) An explanation of whom to contact for answers to pertinent questions about the research and research subjects' rights, and whom to contact in the event of a research-related injury to the subject; and

(8) A statement that participation is voluntary, refusal to participate will involve no penalty or loss of benefits to which the subject is otherwise entitled, and the subject may discontinue participation at any time without penalty or loss of benefits to which the subject is otherwise entitled.

(b) Additional elements of informed consent. When appropriate, one or more of the following elements of information shall also be provided to each subject:

(1) A statement that the particular treatment or procedure may involve risks to the subject (or to the embryo or fetus, if the subject is or may become pregnant) which are currently unforeseeable;

(2) Anticipated circumstances under which the subject's participation may be terminated by the investigator without regard to the subject's consent;

(3) Any additional costs to the subject that may result from participation in the research;

(4) The consequences of a subject's decision to withdraw from the research and procedures for orderly termination of participation by the subject;

(5) A statement that significant new findings developed during the course of the research which may relate to the subject's willingness to continue participation will be provided to the subject; and

(6) The approximate number of subjects involved in the study.

(c) An IRB may approve a consent procedure which does not include, or which alters, some or all of the elements of informed consent set forth above, or waive the requirement to obtain informed consent provided the IRB finds and documents that:

(1) The research or demonstration project is to be conducted by or subject to the approval of state or local government officials and is designed to study, evaluate, or otherwise examine: (i) Public benefit of service programs; (ii) procedures for obtaining benefits or services under those programs; (iii) possible changes in or alternatives to those programs or procedures; or (iv) possible changes in methods or levels of payment for benefits or services under those programs; and

(2) The research could not practicably be carried out without the waiver or alteration.

(d) An IRB may approve a consent procedure which does not include, or which alters, some or all of the elements of informed consent set forth in this section, or waive the requirements to obtain informed consent provided the IRB finds and documents that:

(1) The research involves no more than minimal risk to the subjects;

(2) The waiver or alteration will not adversely affect the rights and welfare of the subjects;

(3) The research could not practicably be carried out without the waiver or alteration; and

(4) Whenever appropriate, the subjects will be provided with additional pertinent information after participation.

(e) The informed consent requirements in this policy are not intended to preempt any applicable federal, state, or local laws which require additional information to be disclosed in order for informed consent to be legally effective.

(f) Nothing in this policy is intended to limit the authority of a physician to provide emergency medical care, to the extent the physician is permitted to do so under applicable federal, state, or local law.

(Approved by the Office of Management and Budget under Control Number 9999–0020)

§ 27.117 Documentation of informed consent.

(a) Except as provided in paragraph (c) of this section, informed consent shall be documented by the use of a written consent form approved by the IRB and signed by the subject or the subject's legally authorized representative. A copy shall be given to the person signing the form.

(b) Except as provided in paragraph (c) of this section, the consent form may be either of the following:

(1) A written consent document that embodies the elements of informed consent required by § 27.116. This form may be read to the subject or the subject's legally authorized representative, but in any event, the investigator shall give either the subject or the representative adequate opportunity to read it before it is signed; or

(2) A short form written consent document stating that the elements of informed consent required by § 27.116 have been presented orally to the subject or the subject's legally authorized representative. When this method is used, there shall be a witness to the oral presentation. Also, the IRB shall approve a written summary of what is to be said to the subject or the representative. Only the short form itself is to be signed by the subject or the representative. However, the witness shall sign both the short form and a copy of the summary, and the person actually obtaining consent shall sign a copy of the summary. A copy of the summary shall be given to the subject or the representative, in addition to a copy of the short form.

(c) An IRB may waive the requirement for the investigator to obtain a signed consent form for some or all subjects if it finds either:

(1) That the only record linking the subject and the research would be the consent document and the principal risk would be potential harm resulting from a breach of confidentiality. Each subject will be asked whether the subject wants documentation linking the subject with the research, and the subject's wishes will govern; or

(2) That the research presents no more than minimal risk of harm to subjects and involves no procedures for which written consent is normally required outside of the research context.

In cases in which the documentation requirement is waived, the IRB may require the investigator to provide subjects with a written statement regarding the research.

(Approved by the Office of Management and Budget under Control Number 9999–0020)

§ 27.118 Applications and proposals lacking definite plans for involvement of human subjects.

Certain types of applications for grants, cooperative agreements, or contracts are submitted to departments or agencies with the knowledge that subjects may be involved within the period of support, but definite plans would not normally be set forth in the application or proposal. These include activities such as institutional type grants when selection of specific projects is the institution's responsibility; research training grants in which the activities involving subjects remain to be selected; and projects in which human subject's involvement will depend upon completion of instruments, prior animal studies, or purification of compounds. These applications need not be reviewed by an IRB before an award may be made. However, except for research exempted or waived under § 27.101 (b) or (i), no human subjects may be involved in any project supported by these awards until the project has been reviewed and approved by the IRB, as provided in this policy, and certification submitted, by the institution, to the department or agency.

§ 27.119 Research undertaken without the intention of involving human subjects.

In the event research is undertaken without the intention of involving human subjects, but it is later proposed to involve human subjects in the research, the research shall first be reviewed and approved by an IRB, as provided in this policy, a certification submitted, by the institution, to the department or agency, and final approval given to the proposed change by the department or agency.

§ 27.120 Evaluation and disposition of applications and proposals for research to be conducted or supported by a Federal Department or Agency.

(a) The department or agency head will evaluate all applications and proposals involving human subjects submitted to the department or agency through such officers and employees of the department or agency and such experts and consultants as the department or agency head determines to be appropriate. This evaluation will take into consideration the risks to the subjects, the adequacy of protection against these risks, the potential benefits of the research to the subjects and others, and the importance of the knowledge gained or to be gained.

(b) On the basis of this evaluation, the department or agency head may approve or disapprove the application or proposal, or enter into negotiations to develop an approvable one.

§ 27.121 [Reserved]

§ 27.122 Use of Federal funds.

Federal funds administered by a department or agency may not be expended for research involving human subjects unless the requirements of this policy have been satisfied.

§ 27.123 Early termination of research support: Evaluation of applications and proposals.

(a) The department or agency head may require that department or agency support for any project be terminated or suspended in the manner prescribed in applicable program requirements, when the department or agency head finds an institution has materially failed to comply with the terms of this policy.

(b) In making decisions about supporting or approving applications or proposals covered by this policy the department or agency head may take into account, in addition to all other eligibility requirements and program criteria, factors such as whether the applicant has been subject to a termination or suspension under paragraph (a) of this section and whether the applicant or the person or persons who would direct or has have directed the scientific and technical aspects of an activity has have, in the judgment of the department or agency head, materially failed to discharge responsibility for the protection of the rights and welfare of human subjects (whether or not the research was subject to federal regulation).

§27.124 Conditions.

With respect to any research project or any class of research projects the department or agency head may impose additional conditions prior to or at the time of approval when in the judgment of the department or agency head additional conditions are necessary for the protection of human subjects.

PART 28—NEW RESTRICTIONS ON LOBBYING

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APPENDIX A TO PART 28—CERTIFICATION REGARDING LOBBYING
APPENDIX B TO PART 28—DISCLOSURE FORM TO REPORT LOBBYING

AUTHORITY: Sec. 319, Pub. L. 101–121 (31 U.S.C. 1352; 5 U.S.C. 301; Sec. 4, as amended, and sec. 5, Pub. L. 101–410, 104 Stat. 890 (28 U.S.C. 2461 note); Pub. L. 104–134, 110 Stat. 1321, 28 U.S.C. 2461 note.

CROSS REFERENCE: See also Office of Management and Budget notice published at 54 FR 52306, December 20, 1989.

SOURCE: 55 FR 6737, 6748, Feb. 26, 1990, unless otherwise noted.

Subpart A—General

§ 28.100 Conditions on use of funds.

(a) No appropriated funds may be expended by the recipient of a Federal contract, grant, loan, or cooperative ageement to pay any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with any of the following covered Federal actions: the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

(b) Each person who requests or receives from an agency a Federal contract, grant, loan, or cooperative agreement shall file with that agency a certification, set forth in Appendix A, that the person has not made, and will not make, any payment prohibited by paragraph (a) of this section.

(c) Each person who requests or receives from an agency a Federal contract, grant, loan, or a cooperative agreement shall file with that agency a disclosure form, set forth in Appendix B, if such person has made or has agreed to make any payment using nonappropriated funds (to include profits from any covered Federal action), which would be prohibited under paragraph (a) of this section if paid for with appropriated funds.

(d) Each person who requests or receives from an agency a commitment providing for the United States to insure or guarantee a loan shall file with that agency a statement, set forth in Appendix A, whether that person has made or has agreed to make any payment to influence or attempt to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with that loan insurance or guarantee.

(e) Each person who requests or receives from an agency a commitment providing for the United States to insure or guarantee a loan shall file with that agency a disclosure form, set forth in Appendix B, if that person has made or has agreed to make any payment to influence or attempt to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with that loan insurance or guarantee.

§ 28.105 Definitions.

For purposes of this part:

(a) *Agency*, as defined in 5 U.S.C. 552(f), includes Federal executive departments and agencies as well as independent regulatory commissions and Government corporations, as defined in 31 U.S.C. 9101(1).

(b) *Covered Federal action* means any of the following Federal actions:

(1) The awarding of any Federal contract;

(2) The making of any Federal grant;

(3) The making of any Federal loan;

(4) The entering into of any cooperative agreement; and,

(5) The extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

Covered Federal action does not include receiving from an agency a commitment providing for the United States to insure or guarantee a loan. Loan guarantees and loan insurance are addressed independently within this part.

(c) *Federal contract* means an acquisition contract awarded by an agency,

including those subject to the Federal Acquisition Regulation (FAR), and any other acquisition contract for real or personal property or services not subject to the FAR.

(d) *Federal cooperative agreement* means a cooperative agreement entered into by an agency.

(e) *Federal grant* means an award of financial assistance in the form of money, or property in lieu of money, by the Federal Government or a direct appropriation made by law to any person. The term does not include technical assistance which provides services instead of money, or other assistance in the form of revenue sharing, loans, loan guarantees, loan insurance, interest subsidies, insurance, or direct United States cash assistance to an individual.

(f) *Federal loan* means a loan made by an agency. The term does not include loan guarantee or loan insurance.

(g) *Indian tribe* and *tribal organization* have the meaning provided in section 4 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450B). Alaskan Natives are included under the definitions of Indian tribes in that Act.

(h) *Influencing or attempting to influence* means making, with the intent to influence, any communication to or appearance before an officer or employee or any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with any covered Federal action.

(i) *Loan guarantee* and *loan insurance* means an agency's guarantee or insurance of a loan made by a person.

(j) *Local government* means a unit of government in a State and, if chartered, established, or otherwise recognized by a State for the performance of a governmental duty, including a local public authority, a special district, an intrastate district, a council of governments, a sponsor group representative organization, and any other instrumentality of a local government.

(k) *Officer or employee of an agency* includes the following individuals who are employed by an agency:

(1) An individual who is appointed to a position in the Government under title 5, U.S. Code, including a position under a temporary appointment;

(2) A member of the uniformed services as defined in section 101(3), title 37, U.S. Code;

(3) A special Government employee as defined in section 202, title 18, U.S. Code; and,

(4) An individual who is a member of a Federal advisory committee, as defined by the Federal Advisory Committee Act, title 5, U.S. Code appendix 2.

(l) *Person* means an individual, corporation, company, association, authority, firm, partnership, society, State, and local government, regardless of whether such entity is operated for profit or not for profit. This term excludes an Indian tribe, tribal organization, or any other Indian organization with respect to expenditures specifically permitted by other Federal law.

(m) *Reasonable compensation* means, with respect to a regularly employed officer or employee of any person, compensation that is consistent with the normal compensation for such officer or employee for work that is not furnished to, not funded by, or not furnished in cooperation with the Federal Government.

(n) *Reasonable payment* means, with respect to perfessional and other technical services, a payment in an amount that is consistent with the amount normally paid for such services in the private sector.

(o) *Recipient* includes all contractors, subcontractors at any tier, and subgrantees at any tier of the recipient of funds received in connection with a Federal contract, grant, loan, or cooperative agreement. The term excludes an Indian tribe, tribal organization, or any other Indian organization with respect to expenditures specifically permitted by other Federal law.

(p) *Regularly employed* means, with respect to an officer or employee of a person requesting or receiving a Federal contract, grant, loan, or cooperative agreement or a commitment providing for the United States to insure or guarantee a loan, an officer or employee who is employed by such person for at least 130 working days within one year immediately preceding the date of the submission that initiates

agency consideration of such person for receipt of such contract, grant, loan, cooperative agreement, loan insurance commitment, or loan guarantee commitment. An officer or employee who is employed by such person for less than 130 working days within one year immediately preceding the date of the submission that initiates agency consideration of such person shall be considered to be regularly employed as soon as he or she is employed by such person for 130 working days.

(q) *State* means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, a territory or possession of the United States, an agency or instrumentality of a State, and a multi-State, regional, or interstate entity having governmental duties and powers.

§ 28.110 Certification and disclosure.

(a) Each person shall file a certification, and a disclosure form, if required, with each submission that initiates agency consideration of such person for:

(1) Award of a Federal contract, grant, or cooperative agreement exceeding $100,000; or

(2) An award of a Federal loan or a commitment providing for the United States to insure or guarantee a loan exceeding $150,000.

(b) Each person shall file a certification, and a disclosure form, if required, upon receipt by such person of:

(1) A Federal contract, grant, or cooperative agreement exceeding $100,000; or

(2) A Federal loan or a commitment providing for the United States to insure or guarantee a loan exceeding $150,000,

unless such person previously filed a certification, and a disclosure form, if required, under paragraph (a) of this section.

(c) Each person shall file a disclosure form at the end of each calendar quarter in which there occurs any event that requires disclosure or that materially affects the accuracy of the information contained in any disclosure form previously filed by such person under paragraphs (a) or (b) of this section. An event that materially affects the accuracy of the information reported includes:

(1) A cumulative increase of $25,000 or more in the amount paid or expected to be paid for influencing or attempting to influence a covered Federal action; or

(2) A change in the person(s) or individual(s) influencing or attempting to influence a covered Federal action; or,

(3) A change in the officer(s), employee(s), or Member(s) contacted to influence or attempt to influence a covered Federal action.

(d) Any person who requests or receives from a person referred to in paragraphs (a) or (b) of this section:

(1) A subcontract exceeding $100,000 at any tier under a Federal contract;

(2) A subgrant, contract, or subcontract exceeding $100,000 at any tier under a Federal grant;

(3) A contract or subcontract exceeding $100,000 at any tier under a Federal loan exceeding $150,000; or,

(4) A contract or subcontract exceeding $100,000 at any tier under a Federal cooperative agreement,

shall file a certification, and a disclosure form, if required, to the next tier above.

(e) All disclosure forms, but not certifications, shall be forwarded from tier to tier until received by the person referred to in paragraphs (a) or (b) of this section. That person shall forward all disclosure forms to the agency.

(f) Any certification or disclosure form filed under paragraph (e) of this section shall be treated as a material representation of fact upon which all receiving tiers shall rely. All liability arising from an erroneous representation shall be borne solely by the tier filing that representation and shall not be shared by any tier to which the erroneous representation is forwarded. Submitting an erroneous certification or disclosure constitutes a failure to file the required certification or disclosure, respectively. If a person fails to file a required certification or disclosure, the United States may pursue all available remedies, including those authorized by section 1352, title 31, U.S. Code.

(g) For awards and commitments in process prior to December 23, 1989, but

not made before that date, certifications shall be required at award or commitment, covering activities occurring between December 23, 1989, and the date of award or commitment. However, for awards and commitments in process prior to the December 23, 1989 effective date of these provisions, but not made before December 23, 1989, disclosure forms shall not be required at time of award or commitment but shall be filed within 30 days.

(h) No reporting is required for an activity paid for with appropriated funds if that activity is allowable under either subpart B or C.

Subpart B—Activities by Own Employees

§28.200 Agency and legislative liaison.

(a) The prohibition on the use of appropriated funds, in §28.100 (a), does not apply in the case of a payment of reasonable compensation made to an officer or employee of a person requesting or receiving a Federal contract, grant, loan, or cooperative agreement if the payment is for agency and legislative liaison activities not directly related to a covered Federal action.

(b) For purposes of paragraph (a) of this section, providing any information specifically requested by an agency or Congress is allowable at any time.

(c) For purposes of paragraph (a) of this section, the following agency and legislative liaison activities are allowable at any time only where they are not related to a specific solicitation for any covered Federal action:

(1) Discussing with an agency (including individual demonstrations) the qualities and characteristics of the person's products or services, conditions or terms of sale, and service capabilities; and,

(2) Technical discussions and other activities regarding the application or adaptation of the person's products or services for an agency's use.

(d) For purposes of paragraph (a) of this section, the following agencies and legislative liaison activities are allowable only where they are prior to formal solicitation of any covered Federal action:

(1) Providing any information not specifically requested but necessary for an agency to make an informed decision about initiation of a covered Federal action;

(2) Technical discussions regarding the preparation of an unsolicited proposal prior to its official submission; and,

(3) Capability presentations by persons seeking awards from an agency pursuant to the provisions of the Small Business Act, as amended by Public Law 95–507 and other subsequent amendments.

(e) Only those activities expressly authorized by this section are allowable under this section.

§28.205 Professional and technical services.

(a) The prohibition on the use of appropriated funds, in §28.100(a), does not apply in the case of a payment of reasonable compensation made to an officer or employee of a person requesting or receiving a Federal contract, grant, loan, or cooperative agreement or an extension, continuation, renewal, amendment, or modification of a Federal contract, grant, loan, or cooperative agreement if payment is for professional or technical services rendered directly in the preparation, submission, or negotiation of any bid, proposal, or application for that Federal contract, grant, loan, or cooperative agreement or for meeting requirements imposed by or pursuant to law as a condition for receiving that Federal contract, grant, loan, or cooperative agreement.

(b) For purposes of paragraph (a) of this section, ''professional and technical services'' shall be limited to advice and analysis directly applying any professional or technical discipline. For example, drafting of a legal document accompanying a bid or proposal by a lawyer is allowable. Similarly, technical advice provided by an engineer on the performance or operational capability of a piece of equipment rendered directly in the negotiation of a contract is allowable. However, communications with the intent to influence made by a professional (such as a licensed lawyer) or a technical person (such as a licensed accountant) are not allowable under this section unless

they provide advice and analysis directly applying their professional or technical expertise and unless the advice or analysis is rendered directly and solely in the preparation, submission or negotiation of a covered Federal action. Thus, for example, communications with the intent to influence made by a lawyer that do not provide legal advice or analysis directly and solely related to the legal aspects of his or her client's proposal, but generally advocate one proposal over another are not allowable under this section because the lawyer is not providing professional legal services. Similarly, communications with the intent to influence made by an engineer providing an engineering analysis prior to the preparation or submission of a bid or proposal are not allowable under this section since the engineer is providing technical services but not directly in the preparation, submission or negotiation of a covered Federal action.

(c) Requirements imposed by or pursuant to law as a condition for receiving a covered Federal award include those required by law or regulation, or reasonably expected to be required by law or regulation, and any other requirements in the actual award documents.

(d) Only those services expressly authorized by this section are allowable under this section.

§ 28.210 Reporting.

No reporting is required with respect to payments of reasonable compensation made to regularly employed officers or employees of a person.

Subpart C—Activities by Other Than Own Employees

§ 28.300 Professional and technical services.

(a) The prohibition on the use of appropriated funds, in § 28.100 (a), does not apply in the case of any reasonable payment to a person, other than an officer or employee of a person requesting or receiving a covered Federal action, if the payment is for professional or technical services rendered directly in the preparation, submission, or negotiation of any bid, proposal, or application for that Federal contract, grant, loan, or cooperative agreement or for meeting requirements imposed by or pursuant to law as a condition for receiving that Federal contract, grant, loan, or cooperative agreement.

(b) The reporting requirements in § 28.110 (a) and (b) regarding filing a disclosure form by each person, if required, shall not apply with respect to professional or technical services rendered directly in the preparation, submission, or negotiation of any commitment providing for the United States to insure or guarantee a loan.

(c) For purposes of paragraph (a) of this section, ''professional and technical services'' shall be limited to advice and analysis directly applying any professional or technical discipline. For example, drafting or a legal document accompanying a bid or proposal by a lawyer is allowable. Similarly, technical advice provided by an engineer on the performance or operational capability of a piece of equipment rendered directly in the negotiation of a contract is allowable. However, communications with the intent to influence made by a professional (such as a licensed lawyer) or a technical person (such as a licensed accountant) are not allowable under this section unless they provide advice and analysis directly applying their professional or technical expertise and unless the advice or analysis is rendered directly and solely in the preparation, submission or negotiation of a covered Federal action. Thus, for example, communications with the intent to influence made by a lawyer that do not provide legal advice or analysis directly and solely related to the legal aspects of his or her client's proposal, but generally advocate one proposal over another are not allowable under this section because the lawyer is not providing professional legal services. Similarly, communications with the intent to influence made by an engineer providing an engineering analysis prior to the preparation or submission of a bid or proposal are not allowable under this section since the engineer is providing technical services but not directly in the preparation, submission or negotiation of a covered Federal action.

(d) Requirements imposed by or pursuant to law as a condition for receiving a covered Federal award include those required by law or regulation, or reasonably expected to be required by law or regulation, and any other requirements in the actual award documents.

(e) Persons other than officers or employees of a person requesting or receiving a covered Federal action include consultants and trade associations.

(f) Only those services expressly authorized by this section are allowable under this section.

Subpart D—Penalties and Enforcement

§28.400 Penalties.

(a) Any person who makes an expenditure prohibited herein shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such expenditure made on or before October 23, 1996, and of not less than $11,000 and not more than $110,000 for each such expenditure made after October 23, 1996.

(b) Any person who fails to file or amend the disclosure form (see Appendix B of this part) to be filed or amended if required herein, shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such failure occurring on or before October 23, 1996, and of not less than $11,000 and not more than $110,000 for each such failure occurring after October 23, 1996.

(c) A filing or amended filing on or after the date on which an administrative action for the imposition of a civil penalty is commenced does not prevent the imposition of such civil penalty for a failure occurring before that date. An administrative action is commenced with respect to a failure when an investigating official determines in writing to commence an investigation of an allegation of such failure.

(d) In determining whether to impose a civil penalty, and the amount of any such penalty, by reason of a violation by any person, the agency shall consider the nature, circumstances, extent, and gravity of the violation, the effect on the ability of such person to continue in business, any prior violations by such person, the degree of culpability of such person, the ability of the person to pay the penalty, and such other matters as may be appropriate.

(e) First offenders under paragraphs (a) or (b) of this section shall be subject to a civil penalty of $10,000, absent aggravating circumstances for each such offense committed on or before October 23, 1996, and $11,000 for each such offense committed after October 23, 1996. Second and subsequent offenses by persons shall be subject to an appropriate civil penalty between $10,000 and $100,000 for each such offense committed on or before October 23, 1996, and between $11,000 and $110,000 for each such offense committed after October 23, 1996, as determined by the agency head or his or her designee.

(f) An imposition of a civil penalty under this section does not prevent the United States from seeking any other remedy that may apply to the same conduct that is the basis for the imposition of such civil penalty.

[55 FR 6737, 6748, Feb. 26, 1990, as amended at 61 FR 55095, Oct. 24, 1996]

§28.405 Penalty procedures.

Agencies shall impose and collect civil penalties pursuant to the provisions of the Program Fraud and Civil Remedies Act, 31 U.S.C. sections 3803 (except subsection (c)), 3804, 3805, 3806, 3807, 3808, and 3812, insofar as these provisions are not inconsistent with the requirements herein.

§28.410 Enforcement.

The head of each agency shall take such actions as are necessary to ensure that the provisions herein are vigorously implemented and enforced in that agency.

Subpart E—Exemptions

§28.500 Secretary of Defense.

(a) The Secretary of Defense may exempt, on a case-by-case basis, a covered Federal action from the prohibition whenever the Secretary determines, in writing, that such an exemption is in the national interest. The Secretary shall transmit a copy of each such written exemption to Congress

immediately after making such a determination.

(b) The Department of Defense may issue supplemental regulations to implement paragraph (a) of this section.

Subpart F—Agency Reports

§ 28.600 Semi-annual compilation.

(a) The head of each agency shall collect and compile the disclosure reports (see Appendix B) and, on May 31 and November 30 of each year, submit to the Secretary of the Senate and the Clerk of the House of Representatives a report containing a compilation of the information contained in the disclosure reports received during the six-month period ending on March 31 or September 30, respectively, of that year.

(b) The report, including the compilation, shall be available for public inspection 30 days after receipt of the report by the Secretary and the Clerk.

(c) Information that involves intelligence matters shall be reported only to the Select Committee on Intelligence of the Senate, the Permanent Select Committee on Intelligence of the House of Representatives, and the Committees on Appropriations of the Senate and the House of Representatives in accordance with procedures agreed to by such committees. Such information shall not be available for public inspection.

(d) Information that is classified under Executive Order 12356 or any successor order shall be reported only to the Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House of Representatives or the Committees on Armed Services of the Senate and the House of Representatives (whichever such committees have jurisdiction of matters involving such information) and to the Committees on Appropriations of the Senate and the House of Representatives in accordance with procedures agreed to by such committees. Such information shall not be available for public inspection.

(e) The first semi-annual compilation shall be submitted on May 31, 1990, and shall contain a compilation of the disclosure reports received from December 23, 1989 to March 31, 1990.

(f) Major agencies, designated by the Office of Management and Budget (OMB), are required to provide machine-readable compilations to the Secretary of the Senate and the Clerk of the House of Representatives no later than with the compilations due on May 31, 1991. OMB shall provide detailed specifications in a memorandum to these agencies.

(g) Non-major agencies are requested to provide machine-readable compilations to the Secretary of the Senate and the Clerk of the House of Representatives.

(h) Agencies shall keep the originals of all disclosure reports in the official files of the agency.

§ 28.605 Inspector General report.

(a) The Inspector General, or other official as specified in paragraph (b) of this section, of each agency shall prepare and submit to Congress each year, commencing with submission of the President's Budget in 1991, an evaluation of the compliance of that agency with, and the effectiveness of, the requirements herein. The evaluation may include any recommended changes that may be necessary to strengthen or improve the requirements.

(b) In the case of an agency that does not have an Inspector General, the agency official comparable to an Inspector General shall prepare and submit the annual report, or, if there is no such comparable official, the head of the agency shall prepare and submit the annual report.

(c) The annual report shall be submitted at the same time the agency submits its annual budget justifications to Congress.

(d) The annual report shall include the following: All alleged violations relating to the agency's covered Federal actions during the year covered by the report, the actions taken by the head of the agency in the year covered by the report with respect to those alleged violations and alleged violations in previous years, and the amounts of civil penalties imposed by the agency in the year covered by the report.

APPENDIX A TO PART 28—CERTIFICATION REGARDING LOBBYING

Certification for Contracts, Grants, Loans, and Cooperative Agreements

The undersigned certifies, to the best of his or her knowledge and belief, that:

(1) No Federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of an agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

(2) If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this Federal contract, grant, loan, or cooperative agreement, the undersigned shall complete and submit Standard Form–LLL, ''Disclosure Form to Report Lobbying,'' in accordance with its instructions.

(3) The undersigned shall require that the language of this certification be included in the award documents for all subawards at all tiers (including subcontracts, subgrants, and contracts under grants, loans, and cooperative agreements) and that all subrecipients shall certify and disclose accordingly.

This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by section 1352, title 31, U.S. Code. Any person who fails to file the required certification shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such failure occurring on or before October 23, 1996, and of not less than $11,000 and not more than $110,000 for each such failure occurring after October 23, 1996.

Statement for Loan Guarantees and Loan Insurance

The undersigned states, to the best of his or her knowledge and belief, that:

If any funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this commitment providing for the United States to insure or guarantee a loan, the undersigned shall complete and submit Standard Form-LLL, ''Disclosure Form to Report Lobbying,'' in accordance with its instructions.

Submission of this statement is a prerequisite for making or entering into this transaction imposed by section 1352, title 31, U.S. Code. Any person who fails to file the required statement shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such failure occurring on or before October 23, 1996, and of not less than $11,000 and not more than $110,000 for each such failure occurring after October 23, 1996.

[55 FR 6737, 6748, Feb. 26, 1990, as amended at 61 FR 55095, Oct. 24, 1996]

APPENDIX B TO PART 28—DISCLOSURE FORM TO REPORT LOBBYING

DISCLOSURE OF LOBBYING ACTIVITIES

Approved by OMB
0348-0046

Complete this form to disclose lobbying activities pursuant to 31 U.S.C. 1352
(See reverse for public burden disclosure.)

1. Type of Federal Action:
☐ a. contract
b. grant
c. cooperative agreement
d. loan
e. loan guarantee
f. loan insurance

2. Status of Federal Action:
☐ a. bid/offer/application
b. initial award
c. post-award

3. Report Type:
☐ a. initial filing
b. material change
For Material Change Only:
year _____ quarter _____
date of last report _____

4. Name and Address of Reporting Entity:
☐ Prime ☐ Subawardee
Tier _____, *if known*:

Congressional District, *if known*:

5. If Reporting Entity in No. 4 is Subawardee, Enter Name and Address of Prime:

Congressional District, *if known*:

6. Federal Department/Agency:

7. Federal Program Name/Description:

CFDA Number, *if applicable*: _____

8. Federal Action Number, *if known*:

9. Award Amount, *if known*:
$

10. a. Name and Address of Lobbying Entity
(if individual, last name, first name, MI):

b. Individuals Performing Services *(including address if different from No. 10a)*
(last name, first name, MI):

(attach Continuation Sheet(s) SF-LLL-A, if necessary)

11. Amount of Payment *(check all that apply)*:
$ _____ ☐ actual ☐ planned

12. Form of Payment *(check all that apply)*:
☐ a. cash
☐ b. in-kind; specify: nature _____
value _____

13. Type of Payment *(check all that apply)*:
☐ a. retainer
☐ b. one-time fee
☐ c. commission
☐ d. contingent fee
☐ e. deferred
☐ f. other; specify: _____

14. Brief Description of Services Performed or to be Performed and Date(s) of Service, including officer(s), employee(s), or Member(s) contacted, for Payment Indicated in Item 11:

(attach Continuation Sheet(s) SF-LLL-A, if necessary)

15. Continuation Sheet(s) SF-LLL-A attached: ☐ Yes ☐ No

16. Information requested through this form is authorized by title 31 U.S.C. section 1352. This disclosure of lobbying activities is a material representation of fact upon which reliance was placed by the tier above when this transaction was made or entered into. This disclosure is required pursuant to 31 U.S.C. 1352. This information will be reported to the Congress semi-annually and will be available for public inspection. Any person who fails to file the required disclosure shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such failure.

Signature: _____
Print Name: _____
Title: _____
Telephone No.: _____ **Date:** _____

Federal Use Only:

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Standard Form - LLL

INSTRUCTIONS FOR COMPLETION OF SF-LLL, DISCLOSURE OF LOBBYING ACTIVITIES

This disclosure form shall be completed by the reporting entity, whether subawardee or prime Federal recipient, at the initiation or receipt of a covered Federal action, or a material change to a previous filing, pursuant to title 31 U.S.C. section 1352. The filing of a form is required for each payment or agreement to make payment to any lobbying entity for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with a covered Federal action. Use the SF-LLL-A Continuation Sheet for additional information if the space on the form is inadequate. Complete all items that apply for both the initial filing and material change report. Refer to the implementing guidance published by the Office of Management and Budget for additional information.

1. Identify the type of covered Federal action for which lobbying activity is and/or has been secured to influence the outcome of a covered Federal action.
2. Identify the status of the covered Federal action.
3. Identify the appropriate classification of this report. If this is a followup report caused by a material change to the information previously reported, enter the year and quarter in which the change occurred. Enter the date of the last previously submitted report by this reporting entity for this covered Federal action.
4. Enter the full name, address, city, state and zip code of the reporting entity. Include Congressional District, if known. Check the appropriate classification of the reporting entity that designates if it is, or expects to be, a prime or subaward recipient. Identify the tier of the subawardee, e.g., the first subawardee of the prime is the 1st tier. Subawards include but are not limited to subcontracts, subgrants and contract awards under grants.
5. If the organization filing the report in item 4 checks "Subawardee", then enter the full name, address, city, state and zip code of the prime Federal recipient. Include Congressional District, if known.
6. Enter the name of the Federal agency making the award or loan commitment. Include at least one organizational level below agency name, if known. For example, Department of Transportation, United States Coast Guard.
7. Enter the Federal program name or description for the covered Federal action (item 1). If known, enter the full Catalog of Federal Domestic Assistance (CFDA) number for grants, cooperative agreements, loans, and loan commitments.
8. Enter the most appropriate Federal identifying number available for the Federal action identified in item 1 (e.g., Request for Proposal (RFP) number; Invitation for Bid (IFB) number; grant announcement number; the contract, grant, or loan award number; the application/proposal control number assigned by the Federal agency). Include prefixes, e.g., "RFP-DE-90-001."
9. For a covered Federal action where there has been an award or loan commitment by the Federal agency, enter the Federal amount of the award/loan commitment for the prime entity identified in item 4 or 5.
10. (a) Enter the full name, address, city, state and zip code of the lobbying entity engaged by the reporting entity identified in item 4 to influence the covered Federal action.

    (b) Enter the full names of the individual(s) performing services, and include full address if different from 10 (a). Enter Last Name, First Name, and Middle Initial (MI).
11. Enter the amount of compensation paid or reasonably expected to be paid by the reporting entity (item 4) to the lobbying entity (item 10). Indicate whether the payment has been made (actual) or will be made (planned). Check all boxes that apply. If this is a material change report, enter the cumulative amount of payment made or planned to be made.
12. Check the appropriate box(es). Check all boxes that apply. If payment is made through an in-kind contribution, specify the nature and value of the in-kind payment.
13. Check the appropriate box(es). Check all boxes that apply. If other, specify nature.
14. Provide a specific and detailed description of the services that the lobbyist has performed, or will be expected to perform, and the date(s) of any services rendered. Include all preparatory and related activity, not just time spent in actual contact with Federal officials. Identify the Federal official(s) or employee(s) contacted or the officer(s), employee(s), or Member(s) of Congress that were contacted.
15. Check whether or not a SF-LLL-A Continuation Sheet(s) is attached.
16. The certifying official shall sign and date the form, print his/her name, title, and telephone number.

Public reporting burden for this collection of information is estimated to average 30 mintues per response, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding the burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Office of Management and Budget, Paperwork Reduction Project (0348-0046), Washington, D.C. 20503.

DISCLOSURE OF LOBBYING ACTIVITIES
CONTINUATION SHEET

Approved by OMB
0348-0046

Reporting Entity: _____ **Page** _____ **of** _____

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Standard Form - LLL-A

PART 29a—AUDIT REQUIREMENTS FOR STATE AND LOCAL GOVERNMENTS

Sec.

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AUTHORITY: Single Audit Act of 1984, Pub. L. 98–502, (31 U.S.C. 7501, *et seq.*); OMB Circular A–128, Audits of State and Local Governments.

SOURCE: 50 FR 30419, July 26, 1985, unless otherwise noted. Redesignated at 56 FR 15993, Apr. 19, 1991.

§29a.1 Purpose.

Pursuant to the Single Audit Act of 1984, Pub. L. 98–502, this part established audit requirements for State and local governments that receive Federal aid, and defines Federal responsibilities for implementing and monitoring those requirements.

§29a.2 Background.

The Single Audit Act builds upon earlier efforts to improve audits of Federal aid programs. The Act requires State and local governments that receive $100,000 or more a year in Federal funds to have an audit made for that year.

§29a.3 Policy.

The Single Audit Act requires the following:

(a) State or local governments that receive $100,000 or more a year in Federal financial assistance shall have an audit made in accordance with this rule.

(b) State or local governments that receive between $25,000 and $100,000 a year shall have an audit made in accordance with this part, or in accordance with Federal laws and regulations governing the programs they participate in.

(c) State or local governments that receive less than $25,000 a year shall be exempt from compliance with the Act and Federal audit requirements. These State or local governments shall be governed by aduit requirements prescribed by State or local law or regulation.

(d) Nothing in this paragraph exempts State or local governments from maintaining records of financial assistance or from providing access to such records to Federal agencies, as provided in Federal law or in Circular A–102, ''Uniform requirements for grants to State of local governments.''

§29a.4 Definitions.

For the purpose of this part, the following definitions from the Single Audit Act apply:

(a) *Cognizant agency* means the Federal agency assigned by the Office of Management and Budget to carry out the responsibilities described in paragraph 8a.10 of this rule.

(b) *Federal financial assistance* means assistance provided by the Department in the form of grants, contracts, cooperative agreements, loans, loan guarantees, property, interest subsidies, insurance, or direct appropriations, but does not include direct Federal cash assistance to individuals. It includes awards received directly from the Department, or directly through other units of State or local governments.

(c) *Federal agency* has the same meaning as the term 'agency' in Section 551(1) of Title 5, United States Code.

(d) *Generally accepted accounting principles* has the meaning specified in the generally accepted government auditing standards.

(e) *Generally accepted government auditing standards* means the *Standards For Audit of Government Organizations, Programs, Activities, and Functions,* developed by the Comptroller General, dated February 27, 1981.

(f) *Independent auditor* means:

(1) A State or local government auditor who meets the independence standards specified in generally accepted government auditing standards; or

(2) A public accountant who meets such independence standards.

(g) *Internal controls* means the plan of organization and methods and procedures adopted by management to ensure that:

(1) Resource use is consistent with laws, regulations, and policies;

(2) Resources are safeguarded against waste, loss, and misuse; and

(3) Reliable data are obtained, maintained, and fairly disclosed in reports.

(h) *Indian Tribe* means any Indian tribe, band, nation, or other organized group or community, including any Alaskan Native village or regional or village corporation (as defined in, or established under, the Alaskan Native

Claims Settlement Act) that is recognized by the United States as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

(i) *Local government* means any unit of local government within a State, including a county, a borough, municipality, city, town, township, parish, local public authority, special district, school district, intrastate district, council of government, and any other instrumentality of local government.

(j) *Major Federal Assistance Program*, for State or local governments having Federal assistance expenditures between $100,000 and $100,000,000, means any program for which Federal expenditures during the applicable year exceed the larger of $300,000, or 3 percent of such total expenditures.

Where total expenditures of Federal assistance exceed $100,000,000, the following criteria apply:

Total expenditures of Federal financial assistance for all programs		Major Federal assistance program means any program that exceeds
More than	But less than	
$100 million	$1 billion	$3 million.
$1 billion	$2 billion	$4 million.
$2 billion	$3 billion	$7 million.
$3 billion	$4 billion	$10 million.
$4 billion	$5 billion	$13 million.
$5 billion	$6 billion	$16 million.
$6 billion	$7 billion	$19 million.
Over $7 billion		$20 million.

(k) *Public accountants* means those individuals who meet the qualifications standards included in generally accepted government auditing standards for personnel performing government audits.

(l) *State* means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, the Trust Territory of the Pacific Islands, and any instrumentality thereof, and any multi-State, regional or interstate entity that has governmental functions and any Indian Tribe.

(m) *Subrecipient* means any person or government department, agency, or establishment that receives Federal financial assistance to carry out a program through a State or local government, but does not include an individual that is a beneficiary of such a program. A subrecipient may also be a direct recipient of Federal financial assistance.

§ 29a.5 Scope of audit.

The Single Audit Act provides that:

(a) The audit shall be made by an independent auditor in accordance with generally accepted government auditing standards covering financial and compliance audits.

(b) The audit shall cover the entire operations of a State or local government or, at the option of that government, it may cover departments, agencies or establishments that received, expended, or otherwise administered Federal financial assistance during the year. However, if a State or local government receives $25,000 or more in General Revenue Sharing Funds in a fiscal year, it shall have an audit of its entire operations. A series of audits of individual departments, agencies, and establishments for the same fiscal year may be considered a single audit.

(c) Public hospitals and public colleges and universities may be excluded from State and local audits and the requirements of this part. However, if such entities are excluded, audits of these entities shall be made in accordance with statutory requirements and the provisions of OMB Circular A–110, ''Uniform requirements for grants to universities, hospitals, and other nonprofit organizations.''

(d) The auditor shall determine whether:

(1) The financial statements of the government, department, agency or establishment present fairly its financial position and the results of its financial operations in accordance with generally accepted accounting principles;

(2) The organization has internal accounting and other control systems to provide reasonable assurance that it is managing Federal financial assistance programs in compliance with applicable laws and regulations; and

(3) The organization has complied with laws and regulations that may have material effect on its financial statements and on each major Federal assistance program.

§29a.6 Frequency of audit.

Audits shall be made annually unless the State or local government has, by January 1, 1987, a constitutional or statutory requirement for less frequent audits. For those governments, the cognizant agency shall permit biennial audits, covering both years, if the government so requests. It shall also honor requests for biennial audits by governments that have an administrative policy calling for audits less frequent than annual, but only for fiscal years beginning before January 1, 1987.

§29a.7 Internal control and compliance reviews.

The Single Audit Act requires that the independent auditor determine and report on whether the organization has internal control systems to provide reasonable assurance that it is managing Federal assistance programs in compliance with applicable laws and regulations.

(a) *Internal control review*. In order to provide this assurance, the auditor must make a study and evaluation of internal control systems used in administering Federal assistance programs. The study and evaluation must be made whether or not the auditor intends to place reliance on such systems. As part of this review, the auditor shall:

(1) Test whether these internal control systems are functioning in accordance with prescribed procedures.

(2) Examine the recipient's system for monitoring subrecipients and obtaining and acting on subrecipient audit reports.

(b) *Compliance review*. The Law also requires the auditor to determine whether the organization has complied with laws and regulations that may have a material effect on each major Federal assistance program.

(1) In order to determine which major programs are to be tested for compliance, State and local governments shall identify in their accounts all Federal funds received and expended and the programs under which they were received. This shall include funds received directly from Federal agencies and through other State and local governments.

(2) The review must include the selection and testing of a representative number of charges from each major Federal assistance program. The selection and testing of transactions shall be based on the auditor's professional judgment considering such factors as the amount of expenditures for the program and the individual awards; the newness of the program or changes in its conditions; prior experience with the program, particularly as revealed in audits and other evaluations (e.g., inspections, program reviews); the extent to which the program is carried out through subrecipients; the extent to which the program contracts for goods or services; the level to which the program is already subject to program reviews or other forms of independent oversight; the adequacy of the controls for ensuring compliance; the expectation of adherence or lack of adherence to the applicable laws and regulations; and the potential impact of adverse findings.

(i) In making the test of transactions, the auditor shall determine whether:

(A) The amounts reported as expenditures were for allowable services, and

(B) The records show that those who received services or benefits were eligible to receive them.

(ii) In addition to transaction testing, the auditor shall determine whether:

(A) Matching requirements, levels of effort and earmarking limitations were met,

(B) Federal financial reports and claims for advances and reimbursements contain information that is supported by the books and records from which the basic financial statements have been prepared, and

(C) Amounts claimed or used for matching were determined in accordance with OMB Circular A–87, ''Cost principles for State and local governments,'' and Attachment F of OMB Circular A–102, ''Uniform requirements for grants to State or local governments.''

(iii) The principle compliance requirements of the largest Federal aid programs may be ascertained by referring to the *Compliance Supplement for Single Audits of State and Local Governments,* issued by OMB and available

from the Government Printing Office. For those programs not covered in the Compliance Supplement, the auditor may ascertain compliance requirements by researching the statutes, regulations, and agreements governing individual programs.

(3) Transactions related to other Federal assistance programs that are selected in connection with examinations of financial statements and evaluations of internal controls shall be tested for compliance with Federal laws and regulations that apply to such transactions.

§ 29a.8 Subrecipients.

State or local governments that receive Federal financial assistance and provide $25,000 or more of it in a fiscal year to a subrecipient shall:

(a) Determine whether State or local subrecipients have met the audit requirements of this part and whether subrecipients covered by Circular A–110, ''Uniform requirements for grants to universities, hospitals, and other nonprofit organizations,'' have met that requirement;

(b) Determine whether the subrecipient spent Federal assistance funds provided in accordance with applicable laws and regulations. This may be accomplished by reviewing an audit of the subrecipient made in accordance with this part, OMB Circular A–110, or through other means (e.g., program reviews) if the subrecipient has not yet had such an audit;

(c) Ensure that appropriate corrective action is taken within six months after receipt of the audit report in instances of noncompliance with Federal laws and regulations;

(d) Consider whether subrecipient audits necessitate adjustment of the recipient's own records; and

(e) Require each subrecipient to permit independent auditors to have access to the records and financial statement as necessary to comply with this part.

§ 29a.9 Relation to other audit requirements.

The Single Audit Act provides that an audit made in accordance with this part shall be in lieu of any financial or financial compliance audit required under individual Federal assistance programs. To the extent that a single audit provides the Department with information and assurance it needs to carry out its overall responsibilities, the Department shall rely upon and use such information. However, the Department shall make any additional audits which are necessary to carry out its responsibilities under Federal law and regulations. Any additional Federal audit effort shall be planned and carried out in such a way as to avoid duplication.

(a) The provisions of this part do not limit the authority of the Department to make, or contract for audits and evaluations of Federal financial assistance programs, nor does it limit the authority of the Inspector General or other Federal audit officials.

(b) The provisions of this part do not authorize any State or local government or subrecipient thereof to constrain the Department, in any manner, from carrying out additional audits.

(c) The Department, when making or contracting for audits in addition to the audits made by recipients pursuant to this part shall, consistent with other applicable laws and regulations, arrange for funding the cost of such additional audits. Such additional audits include economy and efficiency audits, program results audits, and program evaluations.

§ 29a.10 Cognizant agency responsibilities.

The Single Audit Act provides for cognizant Federal agencies to oversee the implementation of this part.

(a) The Office of Management and Budget will assign cognizant agencies for States and their subdivisions and larger local governments and their subdivisions. Other Federal agencies may participate with an assigned cognizant agency in order to fulfill the cognizant responsibilities. Smaller governments not assigned a cognizant agency will be under the general oversight of the Federal agency that provides them the most funds whether directly or indirectly.

(b) A cognizant agency shall have the following responsibilities:

(1) Ensure that audits are made and reports are received in a timely manner and in accordance with the requirements of this rule.

(2) Provide technical advice and liaison to State and local governments and independent auditors.

(3) Obtain or make quality control reviews of selected audits made by non-Federal audit organizations and provide the results, when appropriate, to other interested organizations.

(4) Promptly inform other affected Federal agencies and appropriate Federal law enforcement officials of any reported illegal acts or irregularities. They should also inform State or local law enforcement and prosecuting authorities, if not advised by the recipient, of any violation of law within their jurisdiction.

(5) Advise the recipient of audits that have been found not to have met the requirements set forth in this part. In such instances, the recipient will be expected to work with the auditor to take corrective action. If corrective action is not taken, the cognizant agency shall notify the recipient and Federal awarding agencies of the facts and make recommendations for followup action. Major inadequacies of repetitive substandard performance of independent auditors shall be referred to appropriate professional bodies for disciplinary action.

(6) Coordinate, to the extent practicable, audits made by or for Federal agencies that are in addition to the audits made pursuant to this rule, so that the additional audits build upon such audits.

(7) Oversee the resolution of audit findings that affect the programs of more than one agency.

§29a.11 Illegal acts or irregularities.

If the auditor becomes aware of illegal acts or other irregularities, prompt notice shall be given to recipient management officials above the level of involvement. (See also §8a.12(a)(3) for the auditor's reporting responsibilities.) The recipient, in turn, shall promptly notify the cognizant agency of the illegal acts or irregularities and of proposed and actual actions, if any. Illegal acts and irregularities include such matters as conflicts of interest, falsification of records or reports, and misappropriations of funds or other assets.

§29a.12 Audit reports.

Audit reports must be prepared at the completion of the audit. Reports serve many needs of State and local governments as well as meeting the requirements of the Single Audit Act.

(a) The audit report shall state that the audit was made in accordance with the provisions of this part. The reports shall be made up of at least:

(1) The auditor's report on financial statements and on a schedule of Federal assistance; the financial statements; and a schedule of Federal assistance, showing the total expenditures for each Federal assistance program as identified in the *Catalog of Federal Domestic Assistance*. Federal programs or grants that have not been assigned a catalog number shall be identified under the caption ''other Federal assistance.''

(2) The auditor's report on the study and evaluation of internal control systems must identify the organization's significant internal accounting controls, and those controls designed to provide reasonable assurance that Federal programs are being managed in compliance with laws and regulations. It must also identify the controls that were evaluated, the controls that were not evaluated, and the material weakness identified as a result of the evaluation.

(3) The auditor's report on compliance containing:

(i) A statement of positive assurance with respect to those items tested for compliance, including compliance with law and regulations pertaining to financial reports and claims for advances and reimbursements;

(ii) Negative assurance on those items not tested;

(iii) A summary of all instances of noncompliance; and

(iv) An identification of total amounts questioned, if any, for each Federal assistance award, as a result of noncompliance.

(b) The three parts of the audit report may be bound into a single report, or presented at the same time as separate documents.

(c) All fraud abuse, or illegal acts or indications of such acts, including all questioned costs found as the result of these acts that auditors become aware of, should normally be covered in a separate written report submitted in accordance with § 8a.12(f).

(d) In addition to the audit report, the recipient shall provide comments on the findings and recommendations in the report, including a plan for corrective action taken or planned and comments on the status of corrective action taken on prior findings. If corrective action is not necessary, a statement describing the reason it is not should accompany the audit report.

(e) The reports shall be made available by the State or local government for public inspection within 30 days after the completion of the audit.

(f) In accordance with generally accepted government audit standards, report shall be submitted by the auditor to the organization audited and to those requiring or arranging for the audit. In addition, the recipient shall submit copies of the reports to each Federal department or agency that provided Federal assistance funds to the recipient. Subrecipients shall submit copies to recipients that provided them Federal assistance funds. The reports shall be sent within 30 days after the end of the audit period unless a longer period is agreed to with the cognizant agency.

(g) Recipients of more than $100,000 in Federal funds shall submit one copy of the audit report within 30 days after issuance to a central clearinghouse to be designated by the Office of Management and Budget. The clearinghouse will keep completed audits on file and followup with State or local governments that have not submitted required audit reports.

(h) Recipients shall keep audit reports on file for three years from the date of their issuance.

§ 29a.13 Audit resolution.

(a) As provided in § 8a.10, the cognizant agency shall be responsible for monitoring the resolution of audit findings that affect the programs of more than one Federal agency. Resolution of findings that relate to the programs of a single Federal agency will be the responsibility of the recipient and that agency. Alternate arrangements may be made on a case-by-case basis by agreement among the agencies concerned.

(b) Resolution shall be made within six months after receipt of the report by Federal departments and agencies. Corrective action should proceed as rapidly as possible.

§ 29a.14 Audit workpapers and reports.

Workpapers and reports shall be retained for a minimum of three years from the date of the audit report, unless the auditor is notified in writing by the cognizant agency to extend the retention period. Audit workpapers shall be made available upon request to the cognizant agency or its designee or the General Accounting Office, at the completion of the audit.

§ 29a.15 Audit costs.

The cost of audits made in accordance with the provisions of this part are allowable charges to Federal assistance programs.

(a) The charges may be considered a direct cost of an allocated indirect cost, determined in accordance with the provisions of OMB Circular A-87, ''Cost Principles for State and local governments.''

(b) Generally, the percentage of costs charged to Federal assistance programs for a single audit shall not exceed the percentage that Federal funds expended represent of total funds expended by the recipient during the fiscal year. The percentage may be exceeded, however, if appropriate documentation demonstrates higher actual cost.

§ 29a.16 Sanctions.

The Single Audit Act provides that no cost may be charged to Federal assistance programs for audits required by the Act that are not made in accordance with this part. In cases of continued inability or unwillingness to have a proper audit, Federal agencies must consider other appropriate sanctions including:

(a) Withholding a percentage of assistance payments until the audit is completed satisfactorily,

(b) Withholding or disallowing overhead costs, and

(c) Suspending the Federal assistance agreement until the audit is made.

§29a.17 Auditor selection.

In arranging for audit services State and local governments shall follow the procurement standards prescribed by Attachment O of OMB Circular A–102, ''Uniform requirements for grants to State and local governments.'' The standards provide that while recipients are encouraged to enter into intergovernmental agreements for audit and other services, analysis should be made to determine whether it would be more economical to purchase the services from private firms. In instances where use of such intergovernmental agreements are required by State statutes (e.g., audit services) these statutes will take precedence.

§29a.18 Small and minority audit firms.

Small audit firms and audit firms owned and controlled by socially and economically disadvantaged individuals shall have the maximum practicable opportunity to participate in contracts awarded to fulfill the requirements of this part. Recipients of Federal assistance shall take the following steps to further this goal:

(a) Assure that small audit firms and audit firms owned and controlled by socially and economically disadvantaged individuals are used to the fullest extent practicable.

(b) Make information on forthcoming opportunities available and arrange timeframes for the audit so as to encourage and facilitate participation by small audit firms and audit firms owned and controlled by socially and economically disadvantaged individuals.

(c) Consider in the contract process whether firms competing for larger audits intend to subcontract with small audit firms and audit firms owned and controlled by socially and economically disadvantaged individuals.

(d) Encourage contracting with small audit firms or audit firms owned and controlled by socially and economically disadvantaged individuals which have traditionally audited government programs and, in such cases where this is not possible, assure that these firms are given consideration for audit subcontracting opportunities.

(e) Encourage contracting with consortiums of small audit firms as described in paragraph (a) of this section when a contract is too large for an individual small audit firm or audit firm owned and controlled by socially and economically disadvantaged individuals.

(f) Use the services and assistance, as appropriate, of such organizations as the Small Business Administration in the solicitation and utilization of small audit firms or audit firms owned and controlled by socially and economically disadvantaged individuals.

PART 29b—AUDIT REQUIREMENTS FOR INSTITUTIONS OF HIGHER EDUCATION AND OTHER NONPROFIT ORGANIZATIONS

Sec.

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AUTHORITY: 5 U.S.C. 301.

SOURCE: 56 FR 15993, Apr. 19, 1991, unless otherwise noted.

§29b.1 Purpose.

This part establishes audit requirements and defines the Department's responsibilities for implementing and monitoring such requirements for institutions of higher education and other nonprofit organizations receiving Federal awards. The provisions of this part are effective April 19, 1991, and

shall apply to audits of nonprofit institutions for fiscal years that begin on or after May 20, 1991.

§ 29b.2 Background.

This part sets forth audit requirements pursuant to Office of Management and Budget (OMB) Circular A–133, ''Audits of Institutions of Higher Education and Other Nonprofit Organizations,'' which superseded the audit provisions of Attachment F, subparagraph 2h, of OMB Circular A–110, ''Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and other Nonprofit Organizations.''

§ 29b.3 Policy.

This part does not exempt institutions of higher education and other nonprofit organizations from maintaining records of financial assistance or from providing Federal agencies with access to such records as required by Federal law or OMB Circular A–110, ''Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and other Nonprofit Organizations.''

§ 29b.4 Definitions.

For purposes of this part, the following definitions apply:

Award means financial assistance, and Federal cost-type contracts used to buy services or goods for the use of the Federal Government. It includes awards received directly from the Federal agencies or indirectly through recipients. It does not include procurement contracts to vendors under grants or contracts, used to buy goods or services. Audits of such vendors shall be covered by the terms and conditions of the contract.

Cognizant agency means the Federal agency assigned by OMB to carry out the responsibilities described in § 29b.6.

Coordinated audit approach means an audit wherein the independent auditor, and other Federal and non-Federal auditors consider each other's work in determining the nature, timing, and extent of his or her own auditing procedures. A coordinated audit must be conducted in accordance with ''Government Auditing Standards,'' and meet the objectives and reporting requirements set forth in § 29b.15(b) and 29b.18, respectively. The objective of the coordinated audit approach is to minimize duplication of audit effort, but not to limit the scope of the audit work so as to preclude the independent auditor from meeting the objectives set forth in § 29b.15(b) or issuing the reports required in § 29b.18 in a timely manner.

Federal agency has the same meaning as the term 'agency' in section 551(1) of title 5, United States Code.

Federal financial assistance means assistance provided by a Federal agency to a recipient or sub-recipient to carry out a program. Such assistance may be in the form of grants, contracts, cooperative agreements, loans, loan guarantees, property, interest subsidies, insurance, direct appropriations, or other non-cash assistance.

(1) Such assistance does not include direct Federal cash assistance to individuals.

(2) Such assistance does include awards received directly from Federal agencies, or indirectly when sub-recipients receive funds identified by recipients as Federal funds.

(3) The granting agency is responsible for identifying the source of funds awarded to recipients. Recipients are responsible for identifying the source of funds awarded to sub-receipts.

Generally accepted accounting principles has the meaning specified in the ''Government Auditing Standards.''

Independent auditor means:

(1) A Federal, State or local government auditor who meets the standards specified in the ''Government Auditing Standards;'' or

(2) A public accountant who meets such standards.

Internal control structure means the policies and procedures established to provide reasonable assurance that:

(1) Resource use is consistent with laws, regulations, and award terms;

(2) Resources are safeguarded against waste, loss, and misuse; and

(3) Reliable data is obtained, maintained, and fairly disclosed in reports.

Major program means an individual award or a number of awards in a category of Federal assistance or support for which total expenditures are the

larger of three percent of total Federal funds expended or $100,000, on which the auditor will be required to express an opinion as to whether the major program is being administered in compliance with laws and regulations. Each of the following categories of Federal awards shall constitute a major program where total expenditures are the larger of three percent of total Federal funds expended or $100,000:

(1) Research and Development,

(2) Student Financial Aid, or

(3) Individual awards not in the student aid or research and development category.

Management decision means the evaluation by the management of an establishment of the findings and recommendations included in an audit report and the issuance of a final decision by management concerning its response to such findings and recommendations, including actions concluded to be necessary.

Nonprofit institution means any corporation, trust, association, cooperative or other organization which:

(1) Is operated primarily for scientific, educational, service, charitable, or similar purposes in the public interest;

(2) Is not organized primarily for profit; and

(3) Uses its net proceeds to maintain, improve, and/or expand its operations.

The term *nonprofit institutions* includes institutions of higher education, except those institutions that are audited as part of single audits in accordance with part 29a, ''Audit Requirements for State and Local Governments.'' The term does not include hospitals which are not affiliated with an institution of higher education, or State and local governments and Indian tribes covered by part 29a.

Oversight agency means the Federal agency that provides the predominant amount of direct funding to a recipient not assigned a cognizant agency, unless no direct funding is received. Where there is no direct funding, the Federal agency with the predominant indirect funding will assume the general oversight responsibilities as set forth in §29b.7.

Recipient means an organization receiving financial assistance to carry out a program directly from Federal agencies.

Research and development includes all research activities, both basic and applied, and all development activities that are supported at universities, colleges, and other nonprofit institutions. ''Research'' is defined as a systematic study directed toward fuller scientific knowledge or understanding of the subject studied. ''Development'' is the systematic use of knowledge and understanding gained from research directed toward the production of useful materials, devices, systems, or methods, including design and development of prototypes and processes.

Student Financial Aid includes those programs of general student assistance in which institutions participate, such as those authorized by Title IV of the Higher Education Act of 1965 which is administered by the U.S. Department of Education and similar programs provided by other Federal agencies. It does not include programs which provide fellowships or similar awards to students on a competitive basis, or for specified studies or research.

Sub-recipient means any person or government department, agency, establishment, or nonprofit organization that receives Federal financial assistance to carry out a program through a primary recipient or other sub-recipient, but does not include an individual that is a beneficiary of such a program. A sub-recipient may also be a direct recipient of Federal awards under other agreements.

Vendor means an organization providing a recipient or sub-recipient with generally required goods or services that are related to the administrative support of the Federal assistance program.

§29b.5 Audit of nonprofit institutions.

(a) Requirements based on awards received.

(1) Nonprofit institutions that receive $100,000 or more a year in Federal awards shall have an audit made in accordance with the provisions of this part. However, nonprofit institutions receiving $100,000 or more but receiving awards under only one program have

the option of having an audit of their institution prepared in accordance with the provisions of this part or having an audit made of the one program. For prior or subsequent years, when an institution has only loan guarantees or outstanding loans that were made previously, the institution may be required to conduct audits for those programs, in accordance with regulations of the Federal agencies providing those guarantees or loans.

(2) Nonprofit institutions that receive at least $25,000 but less than $100,000 a year in Federal awards shall have an audit made in accordance with this part or have an audit made of each Federal award, in accordance with Federal laws and regulations governing the programs in which they participate.

(3) Nonprofit institutions receiving less than $25,000 a year in Federal awards are exempt from Federal audit requirements, but records must be available for review by appropriate officials of the Federal grantor agency or subgranting entity.

(b) Oversight by federal agencies.

(1) To each of the larger nonprofit institutions, OMB will assign a Federal agency as the cognizant agency for monitoring audits and ensuring the resolution of audit findings that affect the programs of more than one agency.

(2) Smaller institutions not assigned a cognizant agency will be under the general oversight of the Federal agency that provides them with the most funds.

(3) Assignments to Federal cognizant agencies for carrying out responsibilities in this section are set forth under a supplement to OMB Circular A–133.

(4) Federal Government-owned, contractor-operated facilities at institutions or laboratories operated primarily for the Government are not included in the cognizance assignments. These will remain the responsibility of the contracting agencies. The listed assignments cover all of the functions in this part unless otherwise indicated. OMB coordinates changes in agency assignments.

§ 29b.6 Cognizant agency responsibilities.

The cognizant agency shall:

(a) Ensure that audits are made and reports are received in a timely manner and in accordance with the requirements of this part;

(b) Provide technical advice and liaison to institutions and independent auditors;

(c) Obtain or make quality control reviews of selected audits made by non-Federal audit organizations, and provide the results, when appropriate, to other interested organizations;

(d) Promptly inform other affected Federal agencies and appropriate Federal law enforcement officials of any reported illegal acts or irregularities. A cognizant agency should also inform State or local law enforcement and prosecuting authorities, if not advised by the recipient, of any violation of law within their jurisdiction;

(e) Advise the recipient of audits that have been found not to have met the requirements set forth in this part. In such instances, the recipient will work with the auditor to take corrective action. If corrective action is not taken, the cognizant agency shall notify the recipient and Federal awarding agencies of the facts and make recommendations for follow-up action. Major inadequacies or repetitive substandard performance of independent auditors shall be referred to appropriate professional bodies for disciplinary action;

(f) Coordinate, to the extent practicable, audits or reviews made for Federal agencies that are in addition to the audits made pursuant to this part, so that the additional audits or reviews build upon audits performed in accordance with this part;

(g) Ensure the resolution of audit findings that affect the programs of more than one agency;

(h) Seek the views of other interested agencies before completing a coordinated program; and

(i) Help coordinate the audit work and reporting responsibilities among independent public accountants, State auditors, and both resident and nonresident Federal auditors to achieve the most cost-effective audit.

§29b.7 Oversight agency responsibilities.

An oversight agency shall provide technical advice and counsel to institutions and independent auditors when requested by the recipient. The oversight agency may assume all or some of the responsibilities normally performed by a cognizant agency.

§29b.8 Recipient responsibilities.

A recipient that receives a Federal award and provides $25,000 or more of it during its fiscal year to a sub-recipient shall:

(a) Ensure that nonprofit sub-recipients that receive $25,000 or more have met the audit requirements of this part, and that sub-recipients subject to part 29a, ''Audit Requirements for State and Local Governments,'' have met the audit requirements of that part;

(b) Ensure that appropriate corrective action is taken within six months after receipt of the sub-recipient audit report in instances of noncompliance with Federal laws and regulations;

(c) Consider whether sub-recipient audits necessitate adjustment of the recipient's own records; and

(d) Require each sub-recipient to permit independent auditors to have access to the records and financial statements as necessary for the recipient to comply with this part.

§29b.9 Relation to other audit requirements.

(a) An audit made in accordance with this part shall be in lieu of any financial audit required under individual Federal awards to the extent that it provides the Department with the information and assurances it needs to carry out its overall responsibilities, it shall rely upon and use such information. However, the Department shall make any additional audits or reviews necessary to carry out responsibilities under Federal law and regulations. Any additional Federal audits or reviews shall be planned and carried out in such a way as to build upon work performed by the independent auditor.

(b) Audit planning within the Department shall consider the extent to which reliance can be placed upon work performed by other auditors. Such auditors include Federal, State, local, and other independent auditors, and a recipient's internal auditors. Reliance placed upon the work of other auditors should be documented and in accordance with ''Government Auditing Standards.''

(c) The provisions of this part do not limit the authority of the Department to make or contract for audits and evaluations of Federal awards, nor do they limit the authority of the Inspector General or other Federal official.

(d) The provisions of this part do not authorize any institution or sub-recipient thereof to constrain the Department, in any manner, from carrying out additional audits, evaluations or reviews.

(e) The Department, when making or contracting for audits in addition to the audits made by recipients pursuant to this part, shall, consistent with other applicable laws and regulations, arrange for funding the cost of such additional audits. Such additional audits or reviews include financial audits, performance audits, and program evaluations.

§29b.10 Frequency of audit.

Audits shall usually be performed annually but not less frequently than every two years.

§29b.11 Sanctions.

No audit costs may be charged to Federal awards when audits required by this part have not been made or have been made but not in accordance with the provisions of this part. In cases of continued inability or unwillingness to have a proper audit made in accordance with this part, the Department shall consider appropriate sanctions including:

(a) Withholding a precentage of awards until the audit is completed satisfactorily;

(b) Withholding or disallowing overhead costs, or

(c) Suspending Federal awards until the audit is made.

§29b.12 Audit costs.

The cost of audits made in accordance with the provisions of this part are allowable charges to Federal awards. The charges may be considered

a direct cost or an allocated indirect cost, determined in accordance with the provisions of OMB Circulars A–21, ''Cost Principles for Educational Institutions,'' or A–122, ''Cost Principles for Nonprofit Organizations,'' 48 CFR part 31 of the Federal Acquisition Regulations (FAR) or other applicable cost principles or regulations.

§ 29b.13 Auditor selection.

In arranging for audit services, institutions shall follow the procurement standards prescribed by OMB Circular A–110, ''Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals and Other Nonprofit Organizations.''

§ 29b.14 Small and minority audit firms.

(a) Small audit firms and audit firms owned and controlled by socially and economically disadvantaged individuals shall have the maximum practicable opportunity to participate in contracts awarded to fulfill the requirements of this part.

(b) Recipients of Federal awards shall take the following steps to further this goal:

(1) Ensure that small audit firms and audit firms owned and controlled by socially and economically disadvantaged individuals are used to the fullest extent practicable;

(2) Make information on forthcoming opportunities available and arrange timeframes for the audit to encourage and facilitate participation by small audit firms and audit firms owned and controlled by socially and economically disadvantaged individuals;

(3) Consider in the contract process whether firms competing for larger audits intend to subcontract with small audit firms and audit firms owned and controlled by socially and economically disadvantaged individuals;

(4) Encourage contracting with small audit firms or audit firms owned and controlled by socially and economically disadvantaged individuals which have traditionally audited government programs, and in cases where this is not possible, assure that these firms are given consideration for audit subcontracting opportunities;

(5) Encourage contracting with consortiums of small audit firms as described in paragraph (b)(1) of this section when a contract is too large for an individual small audit firm or audit firm owned and controlled by socially and economically disadvantaged individuals; and

(6) Use the services and assistance, as appropriate, of such organizations as the Small Business Administration in the solicitation and utilization of small audit firms or audit firms owned and controlled by socially and economically disadvantaged individuals.

§ 29b.15 Scope of audit and audit objectives.

(a) The audit shall be made by an independent auditor in accordance with ''Government Auditing Standards'' developed by the Comptroller General of the United States covering financial audits. An audit under this part should be an organization-wide audit of the institution. However, there may be instances where Federal auditors are performing audits or are planning to perform audits at nonprofit institutions. In these cases, to minimize duplication of audit work, a coordinated audit approach may be agreed upon between the independent auditor, the recipient, and the cognizant agency or the oversight agency. Those auditors who assume responsibility for any or all of the reports called for by § 29b.18 should follow guidance set forth in ''Government Auditing Standards'' in using work performed by others.

(b) The auditor shall determine whether:

(1) The financial statements of the institution present fairly its financial position and the results of its operations in accordance with generally accepted accounting principles;

(2) The institution has an internal control structure to provide reasonable assurance that the institution is managing Federal awards in compliance with applicable laws and regulations, and controls that ensure compliance with the laws and regulations that could have a material impact on the financial statements; and

(3) The institution has complied with laws and regulations that may have a

direct and material effect on its financial statement amounts and on each major Federal program.

§29b.16 Internal controls over Federal awards: compliance reviews.

(a) *General.* The independent auditor shall determine and report on whether the recipient has an internal control structure to provide reasonable assurance that it is managing Federal awards in compliance with applicable laws, regulations, and contract terms, and that it safeguards Federal funds. In performing these reviews, independent auditors should rely upon work performed by a recipient's internal auditors to the maximum extent possible. The extent of such reliance should be based upon the ''Government Auditing Standards.''

(b) *Internal control review.* (1) In order to provide this assurance on internal controls, the auditor must obtain an understanding of the internal control structure and assess levels of internal control risk. After obtaining an understanding of the controls, the assessment must be made whether or not the auditor intends to place reliance on the internal control structure.

(2) As part of this review, the auditor shall:

(i) Perform tests of controls to evaluate the effectiveness of the design and operation of the policies and procedures in preventing or detecting material noncompliance. Tests of controls will not be required for those areas where the internal control structure policies and procedures are likely to be ineffective in preventing or detecting noncompliance, in which case a reportable condition or material weakness should be reported in accordance with §29b.18(c)(2);

(ii) Review the recipient's system for monitoring subrecipients and obtaining and acting on sub-recipient audit reports; and

(iii) Determine whether controls are in effect to ensure direct and indirect costs were computed and billed in accordance with the guidance provided in the general requirements section of the ''Compliance Supplement for Single Audits of Educational Institutions and Other Nonprofit Organizations.''

(c) *Compliance review.* (1) The auditor shall determine whether the recipient has complied with laws and regulations that may have a direct and material effect on any of its major Federal programs. In addition, transactions selected for non-major programs shall be tested for compliance with Federal laws and regulations that apply to such transactions.

(2) In order to determine which major programs are to be tested for compliance, recipients shall identify, in their accounts, all Federal funds received and expended and the programs under which they were received. This shall include funds received directly from Federal agencies, through other State and local governments or other recipients. To assist recipients in identifying Federal awards, Federal agencies and primary recipients shall provide the ''Catalog of Federal Domestic Assistance'' (CFDA) numbers to the recipients when making the awards.

(3) The review must include the selection of an adequate number of transactions from each major Federal financial assistance program so that the auditor obtains sufficient evidence to support the opinion on compliance required by §29b.18(c)(3). The selection and testing of transactions shall be based on the auditor's professional judgment considering such factors as the amount of expenditures for the program; the newness of the program or changes in its conditions; prior experience with the program particularly as revealed in audits and other evaluations (e.g., inspections, program reviews, or system reviews required by the FAR); the extent to which the program is carried out through sub-recipients; the extent to which the program contracts for goods or services; the level to which the program is already subject to program reviews or other forms of independent oversight; the adequacy of the controls for ensuring compliance; the expectation of adherence or lack of adherence to the applicable laws and regulations; and the potential impact of adverse findings.

(4) In making the test of transactions, the auditor shall determine whether:

(i) The amounts reported as expenditures were for allowable services, and

(ii) The records show that those who received services or benefits were eligible to receive them.

(5) In addition to transaction testing, the auditor shall determine whether:

(i) Matching requirements, levels of effort and earmarking limitations were met,

(ii) Federal financial reports and claims for advances and reimbursement contain information that is supported by books and records from which the basic financial statements have been prepared, and

(iii) Amounts claimed or used for matching were determined in accordance with:

(A) OMB Circular A–21, ''Cost Principles for Educational Institutions;''

(B) Matching or cost sharing requirements in OMB Circular A–110, ''Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals and Other Nonprofit Organizations;''

(C) OMB Circular A–122, ''Cost Principles for Nonprofit Organizations;''

(D) FAR (48 CFR part 31) cost principles; and

(E) Other applicable cost principles or regulations.

(6) The principal compliance requirements of the largest Federal programs may be ascertained by referring to the ''Compliance Supplement for Single Audits of Educational Institutions and Other Nonprofit Organizations,'' and the ''Compliance Supplement for Single Audits of State and Local Governments'' issued by OMB and available from the Government Printing Office. For those programs not covered in OMB's compliance supplements, the auditor should ascertain compliance requirements by reviewing the statutes, regulations, and agreements governing individual programs.

(7) Transactions related to other awards that are selected in connection with examinations of financial statements and evaluations of internal controls shall be tested for compliance with Federal laws and regulations that apply to such transactions.

[56 FR 15993, Apr. 19, 1991, as amended at 57 FR 4716, Feb. 7, 1992]

§ 29b.17 Illegal acts.

If, during or in connection with the audit of a nonprofit institution, the auditor becomes aware of illegal acts, such acts shall be reported in accordance with the provisions of the ''Government Auditing Standards.''

§ 29b.18 Audit reports.

(a) Audit reports must be prepared at the completion of the audit.

(b) The audit report shall state that the audit was made in accordance with the provisions of this part and OMB Circular A–133, ''Audits of Institutions of Higher Education and Other Nonprofit Organizations.''

(c) The report shall be made up of at least the following three parts:

(1) The financial statements and a schedule of Federal awards and the auditor's report on the statements and the schedule. The schedule should identify the major programs and show the total expenditures for each program. Individual major programs other than Research and Development and Student Aid should be listed by catalog number as identified in the CFDA. Expenditures for Federal programs other than major programs shall be shown under the caption ''other Federal assistance.'' Also, the value of non-cash assistance such as loan guarantees, food commodities or donated surplus properties or the outstanding balance of loans should be disclosed in the schedule.

(2) A written report of the independent auditor's understanding of the internal control structure and the assessment of control risk. The auditor's report should include at a minimum:

(i) The scope of the work in obtaining understanding of the internal control structure and in assessing the control risk;

(ii) The nonprofit institution's significant internal controls or control structure. The auditor should identify the controls established to ensure compliance with laws and regulations that have a material impact on the financial statements and those that provide reasonable assurance that Federal awards are being managed in compliance with applicable laws and regulations; and

(iii) The reportable conditions, including the identification of material weaknesses, identified as a result of the auditor's work in understanding and assessing the control risk. If the auditor limits consideration of the internal control structure for any reason, the circumstances should be disclosed in the report.

(3) The auditor's report on compliance containing:

(i) An opinion as to whether each major Federal program was being administered in compliance with laws and regulations applicable to the matters described in §29b.16(c)(3) of this part, including compliance with laws and regulations pertaining to financial reports and claims for advances and reimbursements;

(ii) A statement of positive assurance of those items that were tested for compliance and negative assurance on those items not tested;

(iii) Material findings of noncompliance presented in their proper perspective:

(A) The size of the universe in number of items and dollars,

(B) The number and dollar amount of transactions tested by the auditors, and

(C) The number and corresponding dollar amount of instances of noncompliance.

(iv) Where findings are specific to a particular Federal award, an identification of total amounts questioned, if any, for each Federal award, as a result of noncompliance and the auditor's recommendations for necessary corrective action.

(d) The three parts of the audit report may be bound into a single document, or presented at the same time as separate documents.

(e) Nonmaterial findings need not be disclosed with the compliance report but should be reported in writing to the recipient in a separate communication. The recipient, in turn, should forward the findings to the Federal grantor agencies or subgrantor sources.

(f) All fraud or illegal acts or indications of such acts, including all questioned costs found as the result of these acts that auditors become aware of, may be covered in a separate written report submitted in accordance with the ''Government Auditing Standards.''

(g) The auditor's report should disclose the status of known but uncorrected significant material findings and recommendations from prior audits that affect the current audit objective as specified in the ''Government Auditing Standards.''

(h) In addition to the audit report, the recipient shall provide a report of its comments on the findings and recommendations in the report, including a plan for corrective action taken or planned and comments on the status of corrective action taken on prior findings. If corrective action is not necessary, a statement describing the reason it is not should accompany the audit report.

(i) Copies of the audit report shall be submitted in accordance with the reporting standards for financial audits contained in the ''Government Auditing Standards.'' Sub-recipient auditors shall submit copies to recipients that provided Federal awards. The report shall be due within 30 days after the completion of the audit, but the audit should be completed and the report submitted not later than 13 months after the end of the recipient's fiscal year unless a longer period is agreed to with the cognizant or oversight agency.

(j) Recipients of more than $100,000 in Federal awards shall submit one copy of the audit report within 30 days after issuance to a central clearinghouse to be designated by OMB. The clearinghouse will keep completed audit reports on file.

(k) Recipients shall keep audit reports, including sub-recipient reports, on file for free three years from their issuance. (OMB control number: 0991–0003)

§29b.19 Audit resolution.

(a) As provided in §29b.6, the cognizant agency shall be responsible for ensuring the resolution of audit findings that affect the programs of more than one Federal agency. Resolution of findings that relate to the programs of a single Federal agency will be the responsibility of the recipient and that agency. Alternate arrangements may be made on a case-by-case basis by

agreement among the agencies concerned.

(b) A management decision shall be made within six months after receipt of the reports by the Federal agencies responsible for audit resolution. Corrective action should proceed as rapidly as possible.

§ 29b.20 Audit workpapers and reports.

Workpapers and reports shall be retained for a minimum of three years from the date of the audit report, unless the auditor is notified in writing by the cognizant agency to extend the retention period. Audit workpapers shall be made available upon request to the cognizant agency or its designee or the General Accounting Office, at the completion of the audit.

§ 29b.21 Availability of publications.

(a) The following publications are available from the Government Printing Office, Superintendent of Documents, Washington, DC 20402:

(1) ''Catalog of Federal Domestic Assistance'';

(2) ''Government Auditing Standards'';

(3) ''Compliance Supplement for Single Audits of Educational Institutions and Other Nonprofit Organizations''; and

(4) ''Compliance Supplement for Single Audits of State and Local Governments.''

(b) The following publications may be obtained from the Grants Officer as identified in the award:

(1) OMB Circular A–21, ''Cost Principles for Educational Institutions;''

(2) OMB Circular A–110, ''Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Nonprofit Organizations;''

(3) OMB Circular A–122, ''Cost Principles for Nonprofit Organizations;'' and

(4) OMB Circular A–133, ''Audits of Institutions of Higher Education and Other Nonprofit Organizations.''

[56 FR 15993, Apr. 19, 1991, as amended by 57 FR 4716. Feb. 7, 1992]