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Subpart C—Regional Offices

§ 105-53.150 Organization and functions.

Regional offices have been established in 11 cities throughout the United States. Each regional office is headed by a Regional Administrator who reports to the Associate Administrator for Operations and Industry Relations. The geographic composition of each region is shown in § 105-53.151.

[54 FR 26742, June 26, 1989]

§ 105-53.151 Geographic composition, addresses, and telephone numbers.

REGIONAL OFFICES—GENERAL SERVICES ADMINISTRATION

Region and Address

No. 1. (Comprising the States of Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont); Boston FOB, 10 Causeway Street, Boston, MA 02222. Telephone: 617-565-5860.

No. 2. (Comprising the States of New Jersey and New York, the Commonwealth of Puerto Rico, and the Virgin Islands); 26 Federal Plaza, New York, NY 10278. Telephone: 212-264-2600.

No. 3. (Comprising the States of Maryland, Virginia (except those jurisdictions within the National Capital Region boundaries), West Virginia, Pennsylvania, and Delaware); Ninth and Market Streets, Philadelphia, PA 19107. Telephone 215-597-1237.

No. 4. (Comprising the States of Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, and Tennessee); 75 Spring Street, SW., Atlanta, GA 30303. Telephone: 404-331-3200.

No. 5. (Comprising the States of Illinois, Indiana, Michigan, Minnesota, Ohio, and Wisconsin); 230 South Dearborn Street, Chicago, IL 60604. Telephone: 312-353-5395.

No. 6. (Comprising the States of Iowa, Kansas, Missouri, and Nebraska); 1500 East Bannister Road, Kansas City, MO 64131. Telephone: 816-926-7201.

No. 7. (Comprising the States of Arkansas, Louisiana, New Mexico, Oklahoma, and Texas); 819 Taylor Street, Fort Worth, TX 76102. Telephone: 817-334-2321.

No. 8. (Comprising the States of Colorado, Montana, North Dakota, South Dakota, Utah, and Wyoming); Building 41, Denver Federal Center, Denver, CO 80225. Telephone: 303-236-7329.

No. 9. (Comprising Guam and the States of Arizona, California, Hawaii, and Nevada); 525 Market Street, San Francisco, CA 94105. Telephone : 415-974-9147.

No. 10. (Comprising the States of Alaska, Idaho, Oregon, and Washington); GSA Center, Auburn, WA 98001. Telephone: 206-931-7000.

National Capital Region. (Comprising the District of Columbia; Counties of Montgomery and Prince Georges in Maryland; and the City of Alexandria and the Counties of Arlington, Fairfax, Loudoun, and Prince William in Virginia); Seventh and D Streets, SW., Washington, DC 20407. Telephone: 202-472-1100.

[51 FR 23231, June 26, 1986, as amended at 52 FR 23658, June 24, 1987; 53 FR 23762, June 24, 1988; 54 FR 26742, June 26, 1989]

PART 105-54—ADVISORY COMMITTEE MANAGEMENT

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Subpart 105-54.4—Reports

105-54.400 Scope of subpart.

105-54.401 Reports on GSA Federal Advisory Committees.

AUTHORITY: Pub. L. 92-463 dated October 6, 1972, as amended; and 5 U.S.C. 552.

SOURCE: 53 FR 40224, Oct. 14, 1988, unless otherwise noted.

§ 105-54.000 Scope of part.

This part sets forth policies and procedures in GSA regarding the establishment, operation, termination, and control of advisory committees for which GSA has responsibility. It implements the Federal Advisory Committee Act (Pub. L. 92-463), which authorizes a system governing the establishment and operation of advisory committees in the executive branch of the Federal Government, and Executive Order 11686 of October 7, 1972, which directs the heads of all executive departments and agencies to take appropriate action to ensure their ability to comply with the provisions of the Act.

Subpart 105-54.1—General Provisions

§ 105-54.101 Applicability.

This part 105-54 applies to all advisory committees for which GSA has responsibility. This part also applies to any committee that advises GSA officials even if the committee were not established for that purpose. This applicability, however, is limited to the period of the committee's use as an advisory body. This part does not apply to:

(a) An advisory committee exempted by an Act of Congress;

(b) A local civic group whose primary function is to render a public service in connection with a Federal program;

(c) A State or local committee, council, board, commission, or similar group established to advise or make recommendations to State or local officials or agencies;

(d) A meeting initiated by the President or one or more Federal official(s) for the purpose of obtaining advice or recommendations from one individual;

(e) A meeting with a group initiated by the President or one or more Fed-

eral official(s) for the sole purpose of exchanging facts or information;

(f) A meeting initiated by a group with the President or one or more Federal official(s) for the purpose of expressing the group's views, provided that the President or Federal official(s) does not use the group recurrently as a preferred source of advice or recommendations;

(g) A committee that is established to perform primarily operational as opposed to advisory functions. Operational functions are those specifically provided by law, such as making or implementing Government decisions or policy. An operational committee would be covered by the Act if it becomes primarily advisory in nature;

(h) A meeting initiated by a Federal official(s) with more than one individual for the purpose of obtaining the advice of individual attendees and not for the purpose of utilizing the group to obtain consensus advice or recommendations. However, such a group would be covered by the Act when an agency accepts the group's deliberations as a source of consensus advice or recommendations;

(i) A meeting of two or more advisory committee or subcommittee members convened solely to gather information or conduct research for a chartered advisory committee, to analyze relevant issues and facts, or to draft proposed position papers for deliberation by the advisory committee or a subcommittee of the advisory committee; and

(j) A committee composed wholly of full-time officers or employees of the Federal Government.

§ 105-54.102 Definitions.

(a) The term "advisory committee" means any committee, board, commission, council, conference, panel, task force, or other similar group or any subcommittee thereof that is:

(1) Established by statute,

(2) Established or utilized by the President, or

(3) Established or utilized by any agency official to obtain advice or recommendations that are within the scope of his/her responsibilities.

The term "advisory committee" excludes the Advisory Committee on Intergovernmental Relations and any

committees composed wholly of full-time officers or employees of the Federal Government.

(b) "Presidential advisory committee" means any committee that advises the President. It may be established by the President or by the Congress, or may be used by the President to obtain advice or recommendations.

(c) "Independent Presidential advisory committee" means any Presidential advisory committee not assigned by the President, or the President's delegate, or by the Congress in law, to an agency for administrative and other support and for which the Administrator of General Services may provide administrative and other support on a reimbursable basis.

(d) "Committee member" means an individual who serves by appointment on a committee and has the full right and obligation to participate in the activities of the committee, including voting on committee recommendations.

(e) "Staff member" means any individual who serves in a support capacity to an advisory committee.

(f) "Secretariat" means the General Services Administration's Committee Management Secretariat. Established pursuant to the Federal Advisory Committee Act, it is responsible for all matters relating to advisory committees, and carries out the Administrator's responsibilities under the Act and Executive Order 12024.

(g) "Utilized" (or used), as stated in the definition of "advisory committee" above, refers to a situation in which a GSA official adopts a committee or other group composed in whole or in part of other than full-time Federal officers or employees with an established existence outside GSA as a preferred source from which to obtain advice or recommendations on a specific issue or policy within the scope of his/her responsibilities in the same manner as that official would obtain advice or recommendations from an established advisory committee.

§ 105-54.103 Policy.

The basic GSA policy on committee management is as follows:

(a) Advisory committees will be formed or used by GSA only when spe-

cifically authorized by law, or by the President, or specifically determined as a matter of formal record by the Administrator of General Services to be in the public interest in connection with the performance of duties imposed on GSA by law;

(b) Advisory committees will not be used to administer a function that is the assigned responsibility of a service or staff office;

(c) The assigned responsibility of a GSA official may not be delegated to any committee;

(d) No advisory committee may be used for functions that are not solely advisory unless specifically authorized by statute or Presidential directive. Making policy decisions and determining action to be taken with respect to any matter considered by an advisory committee is solely the responsibility of GSA; and

(e) In carrying out its responsibilities, GSA will consult with and obtain the advice of interested groups substantially affected by its programs. The use of advisory committees for this purpose is considered to be in the public interest and necessary for the proper performance by GSA of its assigned functions.

§ 105-54.104 Responsibilities.

(a) Responsibility for coordination and control of committee management in GSA is vested in the Associate Administrator for Administration, who serves as the GSA Committee Management Officer (CMO). This Officer carries out the functions prescribed in section 8(b) of the Federal Advisory Committee Act. In doing so, the Officer controls and supervises the establishment, procedures, and accomplishments of GSA-sponsored advisory committees. The Organization and Productivity Improvement Division, Office of Management Services, Office of Administration, provides staff resources and furnishes the Staff Contact Person (SCP) to the CMO.

(b) The Head of each Service and Staff Office and each Regional Administrator selects a Committee Management Officer (CMO) to coordinate and control committee management within the service, staff office, or regional office and to act as liaison to the GSA

Committee Management Officer. The duties of the CMOs are as follows:

(1) Assemble and maintain the reports, records, and other papers of any GSA-sponsored committee during its existence (Arrangements may be made, however, for the Government chairperson or other GSA representative to retain custody of reports, records, and other papers to facilitate committee operations. After the committee is terminated, all committee records are disposed of following existing regulations.); and

(2) Under agency regulations in 41 CFR 105-60, carry out the provisions of 5 U.S.C. 552 with respect to the reports, records, and other papers of GSA-sponsored advisory committees.

Subpart 105-54.2—Establishment of Advisory Committees

§ 105-54.200 Scope of subpart.

This subpart prescribes the policy and procedures for establishing advisory committees within GSA.

§ 105-54.201 Proposals for establishing advisory committees.

(a) The Administrator approves the establishment of all GSA Federal Advisory Committees.

(b) When it is decided that it is necessary to establish a committee, the appropriate Head of the Service or Staff Office (HSSO) must consider the functions of similar committees in GSA to ensure that no duplication of effort will occur.

(c) The HSSO proposes the establishment of a Central Office or regional advisory committee within the scope of assigned program responsibilities. In doing so, the HSSO assures that advisory committees are established only if they are essential to the conduct of agency business. Advisory committees are established only if there is a compelling need for the committees, the committees have a truly balanced membership, and the committees conduct their business as openly as possible under the law and their mandate. Each proposal is submitted to the GSA Committee Management Officer for review and coordination and includes:

(1) A letter addressed to the Committee Management Secretariat signed

by the HSSO with information copies for the Administrator, Deputy Administrator, the Associate Administrator for Congressional and Industry Relations, and the Special Counsel for Ethics and Civil Rights, describing the nature and purpose of the proposed advisory committee; why it is essential to agency business and in the public interest; why its functions cannot be performed by an existing committee of GSA, by GSA, or other means such as a public hearing; and the plans to ensure balanced membership;

(2) A notice for publication in the FEDERAL REGISTER containing the Administrator's certification that creation of the advisory committee is in the public interest and describing the nature and purpose of the committee; and

(3) A draft charter for review by the Committee Management Secretariat.

(d) Subcommittees that do not function independently of the full or parent advisory committee need not follow the requirements of paragraph (c) of this section. However, they are subject to all other requirements of the Federal Advisory Committee Act.

(e) The requirements of paragraphs (a) through (c) of this section apply to any subcommittee of a chartered committee, whether its members are drawn in whole or in part from the full or parent advisory committee, that functions independently of the parent advisory committee, such as by making recommendations directly to a GSA official rather than for consideration by the chartered advisory committee.

§ 105-54.202 Review and approval of proposals.

(a) The GSA Committee Management Officer reviews each proposal to make sure it conforms with GSA policies and procedures. The Officer sends the letter of justification, including the draft charter, to the Committee Management Secretariat. The Secretariat reviews the proposal and provides its views within 15 calendar days of receipt, if possible. The Administrator retains final authority for establishing a particular advisory committee.

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(b) When the Secretariat notifies the Officer that establishing the committee conforms with the Federal Advisory Committee Act, the Officer obtains the Administrator's approval of the charter and the FEDERAL REGISTER notice. The Officer publishes the notice in the FEDERAL REGISTER at least 15 calendar days before the filing of the charter under §105-54.203 with the standing committees of the Senate and the House of Representatives having legislative jurisdiction over GSA. The date of filing constitutes the date of establishment.

§ 105-54.203 Advisory committee charters.

No advisory committee may operate, meet, or take any action until the Administrator approves its charter and the Committee Management Officer sends a copy of it to the standing committees of the Senate and the House of Representatives having legislative jurisdiction over GSA.

§ 105-54.203-1 Preparation of charters.

Each committee charter contains the following information:

- (a) The committee's official designation;
- (b) The committee's objectives and the scope of its activities;
- (c) The period of time necessary for the committee to carry out its purpose (if the committee is intended to function as a standing advisory committee, this should be made clear);
- (d) The official to whom the committee reports, including the official's name, title, and organization;
- (e) The agency and office responsible for providing the necessary support for the committee;
- (f) A description of the duties for which the committee is responsible (if the duties are not solely advisory, the statutory or Presidential authority for additional duties shall be specified);
- (g) The estimated annual operating costs in dollars and person-years for the committee;
- (h) The estimated number and frequency of committee meetings;
- (i) The committee's termination date, if it is less than 2 years from the date of its establishment; and

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(j) The date the charter is filed. This date is inserted by the GSA Committee Management Officer after the Administrator approves the charter.

§ 105-54.203-2 Active charters file.

The GSA Committee Management Officer retains each original signed charter in a file of active charters.

§ 105-54.203-3 Submission to Library of Congress.

The GSA Committee Management Officer furnishes a copy of each charter to the Library of Congress when or shortly after copies are filed with the requisite committees of the Congress. Copies for the Library are addressed: Library of Congress, Exchange and Gift Division, Federal Documents Section, Federal Advisory Committee Desk, Washington, DC 20540.

§ 105-54.204 Advisory committee membership.

(a) Advisory committees that GSA establishes represent the points of view of the profession, industry, or other group to which it relates, taking into account the size, function, geographical location, affiliation, and other considerations affecting the character of a committee. To ensure balance, the agency considers for membership a cross-section of interested persons and groups with professional or personal qualifications or experience to contribute to the functions and tasks to be performed. This should be construed neither to limit the participation nor to compel the selection of any particular individual or group to obtain different points of view relevant to committee business. The Administrator designates members, alternates, and observers, as appropriate, of advisory committees. He/she designates a Federal officer or employee to chair or attend each meeting of each advisory committee. The Administrator also designates GSA employees to serve on advisory committees sponsored by other Government agencies. The HSSO or Regional Administrator submits nominations and letters of designation for the Administrator's signature to

the GSA Committee Management Officer and to the Special Counsel for Ethics and Civil Rights for review and forwarding to the Administrator.

(b) Discrimination is prohibited on the basis of race, color, age, national origin, religion, sex, or mental and physical handicap in selecting advisory committee members.

(c) Nominees for membership must submit a Statement of Employment and Financial Interests (provided to the nominee by the HSSO or Regional Administrator) and may not be appointed until cleared by the Designated Agency Ethics Official.

Subpart 105-54.3—Advisory Committee Procedures

§ 105-54.300 Scope of subpart.

This subpart sets forth the procedures that will be followed in the operation of advisory committees within GSA.

§ 105-54.301 Meetings.

(a) Each GSA advisory committee meeting is open to the public unless the Administrator decides otherwise;

(b) Each meeting is held at a reasonable time and in a place reasonably accessible to the public;

(c) The meeting room size is sufficient to accommodate committee members, committee or GSA staff, and interested members of the public;

(d) Any private citizen is permitted to file a written statement with the advisory committee;

(e) Any private citizen is permitted to speak at the advisory committee meeting, at the chairperson's discretion;

(f) All persons attending committee meetings at which classified information will be considered are required to have an adequate security clearance;

(g) The Designated Federal Officer (who may be either full time or permanent part-time) for each advisory committee and its subcommittees does the following:

(1) Approves or calls the meetings of the advisory committee;

(2) Approves the meeting agenda, which lists the matters to be considered at the meeting and indicates whether any part of the meeting will

be closed to the public under the Government in the Sunshine Act (5 U.S.C. 552b(c)). Ordinarily, copies of the agenda are distributed to committee members before the date of the meeting;

(3) Attends all meetings (no part of a meeting may proceed in the Designated Federal Officer's absence);

(4) Adjourns the meeting when he or she determines that adjournment is in the public interest; and

(5) Chairs the meeting when asked to do so.

(h) The Committee Chairperson makes sure that detailed minutes of each meeting are kept and certifies to their accuracy. The minutes include:

(1) Time, date, and place;

(2) A list of the following persons who were present;

(i) Advisory committee members and staff;

(ii) Agency employees; and

(iii) Private citizens who presented oral or written statements;

(3) The estimated number of private citizens present;

(4) An accurate description of each matter discussed and the resolution of the matter, if any; and

(5) Copies of each report or other document the committee received, issued, or approved.

(i) The responsible HSSO or the Regional Administrator publishes at least 15 calendar days before the meeting a notice in the FEDERAL REGISTER that includes:

(1) The name of the advisory committee as chartered;

(2) The time, date, place, and purpose of the meeting;

(3) A summary of the agenda; and

(4) A statement whether all or part of the meeting is open to the public or closed; and if closed, the reasons why, and citing the specific exemptions of the Government is the Sunshine Act (5 U.S.C. 552b) as the basis for closure;

(j) In exceptional circumstances and when approved by the General Counsel or designee, less than 15 calendar days notice may be given, provided the reasons for doing so are included in the committee meeting notice published in the FEDERAL REGISTER;

(k) Notices to be published in the FEDERAL REGISTER are submitted to the Federal Register Liaison Officer

(CAID). At least five workdays are needed for printing of the notice;

(l) Meetings may also be announced by press release, direct mail, publication in trade and professional journals, or by notice to special interest and community groups affected by the Committee's deliberations. This procedure cannot be a substitute for FEDERAL REGISTER publication;

(m) The fact that a meeting may be closed to the public under the exemptions of the Government in the Sunshine Act does not relieve GSA of the requirement to publish a notice of it in the FEDERAL REGISTER. The Administrator may authorize an exception to this requirement for reasons of national security if the HSSO requests it at least 30 calendar days before the meeting, with the concurrence of the General Counsel of designee.

(n) An advisory committee meeting is not open to the public, nor is the attendance, appearance, or filing of statements by interested persons permitted, if the Administrator decides that the meeting is exempted under the Government in the Sunshine Act (5 U.S.C. 552b (c)) and there is sufficient reason to invoke the exemption. If only part of the meeting concerns exempted matters, only that part is closed. The HSSO or Regional Administrator submits any decisions concerning the closing of meetings in writing to the Administrator for approval at least 30 calendar days in advance of the meeting. These decisions clearly set forth the reasons for doing so, citing the specific exemptions used from the Government in the Sunshine Act in the meeting notice published in the FEDERAL REGISTER. They are made available to the public on request. The Administrator may waive the 30-day requirement when a lesser period of time is requested and adequately justified.

(o) If any meeting or portion of a meeting is closed to public attendance, the advisory committee issues a report at least annually setting forth a summary of its activities and such related matters as would be informative to the public, consistent with the policy of 5 U.S.C. 552(b). Notice of the availability of the report and instructions on how to gain access to it are published in the FEDERAL REGISTER no later than 60

days after its completion. In addition, copies of the report are filed with the Library of Congress.

(p) The General Counsel reviews all requests to close meetings.

(q) The HSSO or Regional Administrator publishes the meeting notices in the FEDERAL REGISTER, including the reasons why all or part of the meeting is closed, citing the specified exemptions used from the Government in the Sunshine Act.

§ 105-54.302 Committee records and reports.

(a) Subject to the Freedom of Information Act (5 U.S.C. 552), the records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents that were available to or prepared for or by a GSA advisory committee are available (until the committee ceases to exist) for public inspection and copying in the office of the Government Chairperson or Designated Federal Officer. Requests to inspect or copy these records are processed under 41 CFR 105-60.4. Except where prohibited by a contract entered into before January 5, 1973, copies of transcripts, if any, of committee meetings are made available by the Government chairperson or Designated Federal Officer to any person at the cost of duplication. After the committee's work ends, disposition of the committee documents and the release of information from them are made in accordance with Federal records, statutes, and regulations.

(b) Subject to 5 U.S.C. 552(b) and instructions of the Committee Management Secretariat, the Government chairperson or Designated Federal Officer files at least eight copies of each report an advisory committee makes, including any report on closed meetings with the Library of Congress at the time of its issuance. Where appropriate, the chairperson also files copies of background papers that consultants to the advisory committee prepare with the Library of Congress. The transmittal letter identifies the materials being furnished, with a copy of the transmittal provided to the GSA Committee Management Officer.

§ 105-54.303 Fiscal and administrative provisions.

(a) Each HSSO and each Regional Administrator ensures that under established GSA procedures, records are kept that fully disclose the disposition of funds at the disposal of an advisory committee and the nature and extent of the committee's activities.

(b) When GSA is assigned to provide administrative support for a Presidential advisory committee, the Agency Liaison Coordinator in the Office of the Deputy Regional Administrator, National Capital Region, as a part of its support, arranges with the Office of Finance, Office of the Comptroller, for maintaining all financial records.

(c) Unless otherwise provided in a Presidential order, statute, or other authority, the GSA service or staff office sponsoring an advisory committee provides support services for the committee.

(d) The guidelines in paragraph (e) through (l) of this section are established under section 7(d) of the Federal Advisory Committee Act, 86 Stat. 773. They apply to the pay of members, staff, and consultants of an advisory committee, except that nothing in this paragraph will affect a rate of pay or a limitation on a rate of pay that is established by statute or a rate of pay established under the General Schedule classification and pay system in Chapter 51 and Subchapter III of Chapter 53 of Title 5, U.S.C.

(e) The members of GSA advisory committee established pursuant to the Administrator's authority under section 205(g) of the Federal Property and Administrative Services Act of 1949, as amended (40 U.S.C. 486(g)), are not compensated, since, by law, members so appointed shall serve without compensation. A person who (without regard to his or her service with an advisory committee) is a full-time Federal employee will normally receive compensation at the rate at which he or she would otherwise be compensated.

(f) When required by law, the pay of the members of GSA advisory committees will be fixed to the daily equivalent of a rate of the General Schedule in 5 U.S.C. 5332 unless the members are appointed as consultants and compensated as provided in paragraph (h)

of this section. In determining an appropriate rate of pay for the members, GSA must give consideration to the significance, scope, and technical complexity of the matters with which the advisory committee is concerned and the qualifications required of the members of the advisory committee. GSA may not fix the pay of the members of an advisory committee at a rate higher than the daily equivalent of the maximum rate for a GS-15 under the General Schedule, unless a higher rate is mandated by statute, or the Administrator has personally determined that a higher rate of pay under the General Schedule is justified and necessary. Such a determination must be reviewed by the Administrator annually. Accordingly, the Administrator may not fix the pay of the members of an advisory committee at a rate of pay higher than the daily equivalent of a rate for a GSA 18, as provided in 5 U.S.C. 5332.

(g) The pay of each staff member of an advisory committee is fixed at a rate of the General Schedule, General Management Schedule, or Senior Executive Service pay rate in which the staff member's position would be placed (5 U.S.C. Chapter 51). GSA cannot fix the pay of a staff member higher than the daily equivalent of the maximum rate for GS-15 unless the Administrator decides that under the General Schedule, General Management Schedule, or Senior Executive Service classification system, the staff member's position should be higher than GS-15. The Administrator must review this decision annually.

(1) In establishing compensation rates, GSA must comply with applicable statutes, regulations, Executive Orders, and administrative guidelines.

(2) A staff member who is a Federal employee serves with the knowledge of the Designated Federal Officer and the approval of the employee's direct supervisor. A staff member who is a non-Federal employee is appointed under agency procedures, after consultation with the advisory committee.

(h) The pay of a consultant to an advisory committee will be fixed after giving consideration to the qualifications required of the consultant and the significance, scope, and technical complexity of the work. The rate of

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pay will not exceed the maximum rate of pay which the agency may pay experts and consultants under 5 U.S.C. 3109 and must be in accordance with any applicable statutes, regulations, Executive Orders, and administrative guidelines.

(i) Advisory committee and staff members, while performing their duties away from their homes or regular places of business, may be allowed travel expenses, including per diem instead of subsistence, as authorized by 5 U.S.C. 5703 for persons employed intermittently in the Government service.

(j) Members of an advisory committee and its staff who are blind or deaf or who otherwise qualify as handicapped persons (under section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 794)), and who do not otherwise qualify for assistance under 5 U.S.C. 3102, as an employee of an agency (under section 3102(a)(1) of Title 5), may be provided the services of a personal assistant.

(k) Under this paragraph, GSA may accept the gratuitous services of a member, consultant, or staff member of an advisory committee who agrees in advance to serve without compensation.

(l) A person who immediately before his or her service with an advisory committee was a full-time Federal employee may receive compensation at the rate at which he or she was compensated as a Federal employee.

§ 105-54.304 Cost guidelines.

(a) The reporting and estimating of the costs of advisory committees include direct obligations for the following items:

(1) Pay compensation of committee members; consultants to the committee; all permanent, temporary, or part-time (GM, GS, WB, or other) positions which are a part of or support the committee; and all overtime related to committee functions (Compensation should reflect actual or estimated Federal person-years or parts thereof devoted to a committee's activities. It includes the compensation of Federal employees assigned to committees, on a reimbursable or nonreimbursable basis, from agencies or departments other than to which the committee reports.);

(2) Personnel benefits associated with the above compensation (13 percent of basic payroll);

(3) Travel costs (including per diem) of committee members; consultants; and all permanent, temporary, or part-time positions which are a part of or support the committee;

(4) Transportation of things, communications, and printing and reproduction;

(5) Rent for additional space acquired for committee use;

(6) Other services required by the committee, including data processing services, management studies and evaluations, contractual services, and reimbursable services; and

(7) Supplies, materials, and equipment acquired for committee use.

(b) The reporting and estimating of the cost of advisory committees does not include indirect or overhead costs; e.g., the costs of the committee management system (committee management officers, etc.).

§ 105-54.305 Renewal of advisory committees.

(a) Each advisory committee being continued is renewed for successive 2-year periods beginning with the date when it was established according to the following, except for statutory advisory committees: (For renewal of statutory advisory committees, see paragraph (b) of this section.)

(1) Advisory committees are not renewed unless there is a compelling need for them, they have balanced membership, and they conduct their business as openly as possible under the law.

(2) The renewal of a committee requires that the responsible HSSO submit to the GSA Committee Management Officer the following:

(i) An updated charter with an explanation of the need for the renewal of the committee. The charter and explanation are furnished 60 calendar days before the 2-year anniversary date of the committee.);

(ii) A letter signed by the HSSO to the Director, Committee Management Secretariat, with information copies to the Administrator and the Deputy Administrator, setting forth:

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(A) An explanation of why the committee is essential to the conduct of agency business and is in the public interest;

(B) GSA's plan to attain balanced membership of the committee; and

(C) An explanation of why the committee's functions cannot be performed by GSA, another existing GSA advisory committee, or other means such as a public hearing;

(iii) A notice for publication in the FEDERAL REGISTER describing the nature and purpose of the committee and containing a certification by the Administrator that renewing the advisory committee is in the public interest.

(3) On receiving the above documents, the GSA Committee Management Officer submits the renewal letter to the Committee Management Secretariat's views on the committee renewal, the Officer obtains the Administrator's approval of the charter and the FEDERAL REGISTER notice. The Officer publishes notice of the renewal in the FEDERAL REGISTER and files copies of the updated charter. The 15-day notice requirement does not apply to committee renewals, notices of which may be published concurrently with the filing of the charter.

(b) Each statutory advisory committee is renewed by the filing of a renewal charter upon the expiration of each successive 2-year period following the date of enactment of the statute establishing the committee according to the following:

(1) The procedures in paragraph (a)(2) of this section apply to the renewal of a statutory committee except that neither prior consultation with the Committee Management Secretariat nor a FEDERAL REGISTER notice is required. Accordingly, the letter that paragraph a(2)(ii) requires is sent to the Administrator rather than the Committee Management Secretariat. Due to the nature of a committee the law established, the explanation of the need to continue the committee's existence is less extensive than the explanation for the continuation of a non-statutory committee; and

(2) The GSA Committee Management Officer provides the Committee Management Secretariat with a copy of the filed charter.

(c) An advisory committee required to file a new charter may not take any action other than preparing the charter between the date it is to be filed and the date it is actually filed.

§ 105-54.306 Amendment of advisory committee charters.

(a) A charter is amended when GSA decides that the existing charter no longer accurately reflects the objectives or functions of the committee. Changes may be minor, such as revising the name of the committee or modifying the estimated number or frequency of meetings, or they may be major dealing with the basic objectives or composition of the committee. The Administrator retains final authority for amending the charter of an advisory committee. Amending an existing advisory committee charter does not constitute renewal of the committee.

(b) To make a minor amendment, the Administrator approves the amended charter and has it filed according to § 105-54.203-1.

(c) To make a major amendment, the Committee Management Officer submits an amended charter and a letter to the Committee Management Secretariat, signed by the HSSO with the concurrence of the General Counsel or designee, requesting the Secretariat's views on the amended language, along with an explanation of the purpose of the changes and why they are necessary. The Secretariat reviews the proposed changes and notifies the Committee Management Officer of its views within 15 calendar days of receiving it, if possible. The Administrator has the charter filed according to § 105-54.203-1.

(d) Amending an existing charter does not constitute renewal of the committee.

§ 105-54.307 Termination of advisory committees.

(a) The sponsoring HSSO terminates an advisory committee that has fulfilled the purpose stated in its charter. The official takes action to rescind any existing orders relating to the committee and to notify committee members, the

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GSA Committee Management Officer, and the Committee Management Secretariat of the termination.

(b) Failing to continue an advisory committee by the 2-year anniversary date terminates the committee, unless its duration is provided for by law.

§ 105-54.308 Responsibilities of the Administrator.

The Administrator must ensure:

(a) Compliance with the Federal Advisory Committee Act and this chapter;

(b) Issuance of administrative guidelines and management controls that apply to all advisory committees established or used by the agency;

(c) Designation of a Committee Management Officer to carry out the functions specified in section 89(b) of the Federal Advisory Committee Act;

(d) Provision of a written determination stating the reasons for closing any advisory committee meeting to the public;

(e) A review, at least annually, of the need to continue each existing advisory committee, consistent with the public interest and the purpose and functions of each committee;

(f) The appointment of a Designated Federal Officer for each advisory committee and its subcommittee;

(g) The opportunity for reasonable public participation in advisory committee activities; and

(h) That the number of committee members is limited to the fewest necessary to accomplish committee objectives.

§ 105-54.309 Added responsibilities of service and staff office heads and regional administrators.

(a) No later than the first meeting of an advisory committee, submit to committee members, committee staff, consultants, and appropriate agency management personnel a written statement of the purpose, objectives, and expected accomplishments of the committee;

(b) Solicit in writing or in a formal meeting at least annually the views of committee members on the effectiveness, activities, and management of the committee, including recommendations for improvement. Review comments to determine whether improve-

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ments or corrective action is warranted. Retain recommendations until the committee is terminated or renewed.

(c) Involve key management personnel of the agency whose interests are affected by the committee in committee meetings, including reviewing reports and establishing agendas.

(d) Periodically, but not less than annually, review the level of committee staff support to make sure that expenditures are justified by committee activity and benefit to the Government.

(e) Monitor the attendance and participation of committee members and consider replacing any member who misses a substantial number of scheduled meetings.

(f) Establish meeting dates and distribute agendas and other materials well in advance.

§ 105-54.310 Advisory committee duties of the GSA Committee Management Officer.

In addition to implementing the provisions of section 8(b) of the Federal Advisory Committee Act, the GSA Committee Management Officer carries out all responsibilities delegated by the Administrator. The Officer ensures that sections 10(b), 12(a), and 13 of the Act are implemented by GSA to provide for appropriate record keeping. Records include, but are not limited to:

(a) A set of approved charters and membership lists for each advisory committee;

(b) Copies of GSA's portion of the Annual Report of Federal Advisory Committees.

(c) Guidelines on committee management operations and procedures as maintained and updated; and

(d) Determinations to close advisory committee meetings.

§ 105-54.311 Complaint procedures.

(a) Any person whose request for access to an advisory committee document is denied may seek administrative review under 41 CFR 105-60, which implements the Freedom of Information Act. (See GSA Order, GSA regulations under the "Freedom of Information Act" (ADM 7900.3A).)

(b) Aggrieved individuals or organizations may file written complaints on

matters not involving access to documents with the Deputy Administrator, General Services Administration, Washington, DC 20405. Complaints must be filed within 90 calendar days from the date the grievance arose. The Deputy Administrator promptly acts on each complaint and notifies the complainant in writing of the decision.

Subpart 105-54.4—Reports

§ 105-54.400 Scope of subpart.

This subpart sets forth the reports required by this part 105-54 and prescribes instructions for submission of the reports.

§ 105-54.401 Reports on GSA Federal Advisory Committees.

(a) The Committee Management Secretariat periodically issues reporting instructions and procedures. The GSA Committee Management Officer files a report each fiscal year providing program, financial, and membership information. The Secretariat uses the information in preparing recommendations and status reports on advisory committee matters and in assisting the President in preparing and submitting a fiscal year report to the Congress. Instructions for preparing GSA's submission are provided by the GSA Committee Management Officer.

(b) Reports on closed meetings are required as specified in § 105-54.301(o).

PART 105-55—COLLECTION OF CLAIMS OWED THE UNITED STATES

Sec.

- 105-55.001 Background.
- 105-55.002 Purpose.
- 105-55.003 Applicability.
- 105-55.004 Demand for payment.
- 105-55.005 Interest, administrative charges, and penalty charges.
- 105-55.006 Responsibility for collection.
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- 105-55.008 Settlement of claims.
- 105-55.009 Referral for litigation.
- 105-55.010 Disclosure to credit reporting agencies and referrals to collection agencies.
- 105-55.011 Credit report.

AUTHORITY: 31 U.S.C. 3701-3719; Pub. L. 97-365, 96 Stat. 1754.

SOURCE: 50 FR 37531, Sept. 16, 1985, unless otherwise noted.

§ 105-55.001 Background.

The Department of Justice and the General Accounting Office have jointly issued amended Federal Claims Collection Standards (4 CFR parts 101-105) which reflect changes to the Federal Claims Collection Act of 1966 (31 U.S.C. 3701-3719) made by the passage of the Debt Collection Act of 1982 (Pub. L. 97-365, 96 Stat. 1754). The preamble to the amended Federal Claims Collection Standards instructs individual agencies to adopt their own regulations as to detailed procedures in furtherance of the Federal Claims Collection Standards. Additionally, the Debt Collection Act of 1982 directs, as reflected in the Federal Claims Collection Standards, that each agency must prescribe regulations on collecting by administrative offset and that each agency may prescribe regulations identifying circumstances appropriate to waive collection of interest and charges in conformity with the Federal Claims Collection Standards.

§ 105-55.002 Purpose.

In keeping with the suggestion in the preamble to the amended Federal Claims Collection Standards and the directives in the Debt Collection Act of 1982 and the Federal Claims Collection Standards as to administrative offset and the collection of interest and charges, this part provides procedures for the General Services Administration to collect, compromise, or terminate collection action on claims owed to the United States arising from activities under GSA jurisdiction. It implements the Federal Claims Collection Act as amended by the Debt Collection Act. It supplements the regulations published jointly by the General Accounting Office and the Department of Justice. It sets forth procedures by which GSA:

- (a) Will collect claims owed to the United States;
- (b) Will determine and collect interest and other charges on those claims;
- (c) Will compromise claims; and
- (d) Will refer unpaid claims for litigation.

§ 105-55.003 Applicability.

(a) This part applies to all claims due the United States under the Federal

Claims Collection Act, as amended by the Debt Collection Act, arising from activities under the jurisdiction of the General Services Administration, except for the collection by administrative offset of those claims arising out of contracts subject to the Contracts Disputes Act of 1982, 41 U.S.C. 601 et. seq. The word "claims" includes but is not limited to amounts due the United States from fees, overpayments, fines, civil penalties, damages, interest and other sources.

(b) Claims arising from the audit of transportation accounts pursuant to 31 U.S.C. 3726 shall be determined, collected, compromised, terminated or settled in accordance with regulation published under the authority of 31 U.S.C. 3726 (see 41 CFR part 101-41, administered by the Director, Office of Transportation Audits) and are otherwise excepted from these regulations.

[50 FR 37531, Sept. 16, 1985, as amended at 52 FR 46468, Dec. 8, 1987]

§ 105-55.004 Demand for payment.

(a) A total of three progressively stronger written demands at approximately 30-day intervals will normally be made, unless a response or other information indicates that additional written demands would either be unnecessary or futile. When necessary to protect the Government's interest, written demand may be preceded by other appropriate actions under the Federal Claims Collection Standards, including immediate referral for litigation and/or offset.

(b) The initial written demand for payment shall inform the debtor of:

- (1) The basis for the claim;
- (2) The amount of the claim;
- (3) The date when payment is due; (30 days from date of mailing or hand delivery of the initial demand for payment);
- (4) The provision for interest, penalties, and administrative charges in accordance with 31 U.S.C. 3717, if payment is not received by the due date (See § 105-55.005 for details regarding interest, administrative charges, and penalty charges.)

(5) The intent of the agency to collect by administrative offset, including asking the assistance of other Federal agencies to help in the offset whenever

possible, if the debtor has not made payment by the payment due date, has not requested a review of the claim within the agency as set out in paragraph (b)(8) of this section or has not made an arrangement for payment by the payment due date;

(6) The right of the debtor to inspect and copy the records of the agency related to the claim. Any costs associated therewith shall be borne by the debtor. The debtor shall give reasonable notice in advance to the agency of the date upon which it intends to inspect and copy the records involved;

(7) The right of the debtor to a review of the claim within the agency. If the claim is disputed in full or part, the debtor shall respond to the demand in writing by making a request for a review of the claim within the agency by the payment due date stated in the demand. The debtor's written response shall state the basis for the dispute. If only part of the claim is disputed, the undisputed portion should be paid by the date stated in the initial demand. The agency shall acknowledge receipt of the request for a review, and upon completion of consideration shall notify the debtor whether its determination has been sustained, amended, or canceled within 15 days of the receipt of the request for a review. If the agency either sustains or amends its determination, it shall notify the debtor of its intent to collect by administrative offset unless payment is received within 15 days of the mailing of the notification of its decision following a review of the claim.

(8) The right of the debtor to offer to make a written agreement to repay the amount of the claim. The acceptance of such an agreement is discretionary with the agency. If the debtor requests a repayment arrangement because a payment of the amount due would create a financial hardship, the appropriate GSA Regional Finance Division will analyze the debtor's financial condition. Dependent upon the Regional Finance Division's evaluation of the financial strength of the debtor, the Comptroller or the appropriate designee and the debtor may agree to a written installment repayment schedule. The debtor shall execute a confession-judgment note which specifies all of

the terms of the arrangement. The size and frequency of installment payments should bear a reasonable relation to the size of the debt and the debtor's ability to pay. Interest, administrative charges, and penalty charges shall be provided for in the note. The debtor shall be provided with a written explanation of the consequences of signing a confess-judgment note. The debtor shall sign a statement acknowledging receipt of the written explanation which shall recite that the statement was read and understood before execution of the notice and that the note is being signed knowingly and voluntarily. Some form of objective evidence of these facts should be maintained in the agency's file on the debtor.

(c) If no response to the demand is received by the date stated in the demand, GSA will take further action under this subpart or under the Federal Claims Collection Standards. These actions may include reports to credit bureaus, referrals to collection agencies, termination of contract, debarment, offset of Federal salary, and other administrative offset, as authorized in 31 U.S.C. 3701-3719.

§ 105-55.005 Interest, administrative charges, and penalty charges.

(a) GSA shall assess interest on unpaid claims at the rate of the current value of funds to the Treasury as prescribed by the Secretary of the Treasury on the date interest begins to run. GSA shall assess administrative charges to cover the costs of processing and handling overdue claims. GSA shall assess penalty charges of six percent a year on any part of a debt more than 90 days past due. The imposition of interest, administrative charges, and penalty charges are made in accordance with 31 U.S.C. 3717.

(b) Interest will be computed from the date of *mailing* or *hand delivery* of the initial demand if the amount of the claim is not paid within 30 days. The 30-day period may be extended in individual cases if there is good cause to do so and it is in the public interest. Interest will only be computed on the principal of the claim and the interest rate will remain fixed for the duration of the indebtedness, except where a debtor has defaulted on a repayment

agreement and seeks to enter into a new agreement. A new rate which reflects the current value of funds to the Treasury at the time the new agreement is executed may be set if applicable and interest on interest and related charges may be charged where the debtor has defaulted on a previous repayment agreement. Charges which accrued but were not collected under the defaulted agreement shall be added to the principal to be paid under the new repayment schedule.

(c) GSA may waive interest, administrative charges, or penalty charges if it finds that:

(1) The debtor is unable to pay any significant sum toward the claim within a reasonable period of time;

(2) Collection of interest, administrative charges, or penalty charges will jeopardize collection of the principal of the claim; or

(3) It is otherwise in the best interests of the United States, including the situation where an offset or installment payment agreement is in effect.

§ 105-55.006 Responsibility for collection.

(a) Heads of Central Office Services and Staff Offices and Regional Administrators must initiate actions on claims arising from their program operations and immediately notify the appropriate Regional Finance Division. A claim will be recorded and controlled by the Regional Finance Division upon receipt of documentation from a competent authority establishing the amount due.

(b) The collection of claims under the control of Regional Finance Divisions will be aggressively pursued in accordance with the provisions of part 102 of the Federal Claims Collection Standards (4 CFR part 102). Whenever feasible, debts owed to the United States, together with interest, administrative charges and penalty charges, should be collected in full in one lump sum. If the debtor requests installment payments, the Regional Finance Divisions shall be responsible for determining the financial hardship of debtors and when appropriate shall arrange installment payment schedules. Claims which cannot be collected either directly or by administrative offset shall either be

written off as administratively uncollectible in accordance with authority delegated to the Director, Office of Finance and the Directors, Regional Finance Divisions, or referred to the appropriate Assistant General Counsel or Regional Counsel for further consideration.

(c) The General Counsel, delegated officials in the Office of General Counsel, and each Regional Counsel may compromise or suspend or terminate the collection of, referred claims under \$20,000, exclusive of interest, penalties and administrative charges under the Act and the Federal Claims Collection Standards 4 CFR parts 103 and 104.

(d) The Office of General Counsel officials listed in paragraph (c) of this section have the responsibility for referring to the Department of Justice all claims over \$20,000 exclusive of interest, penalties and administrative charges which cannot be compromised, suspended or terminated in accordance with the Federal Claims Collection Act and the Federal Claims Collections Standards. Referrals to the Department of Justice shall be made in accordance with 4 CFR part 105 of the Federal Claims Collections Standards.

§ 105-55.007 Collection by offset.

(a) Whenever feasible, after a debtor fails to pay the claim, request a review of the claim, or make an arrangement for payment. The Comptroller or his appropriate regional designee will collect claims under this part by means of administrative offset against obligations of the United States to the debtor, pursuant to 31 U.S.C. 3716, except offset of Federal salaries and claims arising out of contracts subject to the Contract Disputes Act of 1978, 41 U.S.C. 601 et. seq.

(b) Salary offsets and offsets against military retired pay are governed by 5 U.S.C. 5514.

(c) Collection by administrative offset of amounts payable from Civil Service Retirement and Disability Fund will be made pursuant to 5 U.S.C. 5514 and 5 U.S.C. 5705 and regulations thereunder.

(d) The offset of claims arising out of contracts subject to the Contract Disputes Act of 1978, 41 U.S.C. 601 et. seq.

will be made pursuant to the Government common law right of offset.

(e) GSA will promptly make requests for offset to other agencies holding funds payable to a debtor and provide instructions for the transfer of these funds. Requests for offset received from other agencies shall be processed promptly and the funds transferred to the requesting agency.

(f) If administrative offset cannot be effected through GSA or other known agency accounts receivable, then GSA will place a complete stop order against amounts otherwise payable to the debtor by placing the name of that debtor on the Department of the Army "List of Contractors Indebted to the United States." If any amounts are discovered under this procedure, they will be offset against the debt owed to GSA.

(g) GSA should not attempt to effect collection by administrative offset when:

(1) The debtor has ceased to do business and there are no known or potential obligations payable by any agency of the United States Government to the debtor.

(2) The debt in question is over ten years old.

(3) The debtor has either gone into receivership and has liquidated all of its assets or has filed a petition in bankruptcy as a no asset debtor, and there is no likelihood of the debtor resuming operations; and there are no known or potential obligations payable by any agency of the United States Government to the debtor. In the case of a bankruptcy petition, the automatic stay against setoff must be honored pending release from the stay.

(4) The debtor is deceased, and there are no attachable assets in the estate.

(5) Any other circumstances which would indicate that the likelihood of collection by administrative offset is less than probable.

[50 FR 37531, Sept. 16, 1985, as amended at 52 FR 46468, Dec. 8, 1987]

§ 105-55.008 Settlement of claims.

(a) In accordance with the provisions of 4 CFR part 103, GSA officials listed in § 105-55.006(c) may settle claims not exceeding \$20,000 exclusive of interest, penalties and administrative charges

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by compromise at less than the principal of the claim if:

(1) The debtor shows an inability to pay the full amount within a reasonable time;

(2) The Government would be unable to enforce complete collection by any means within a reasonable time;

(3) The amount of the claim does not justify the actual foreseeable collection cost of the claim; or

(4) A combination of the above reasons.

(b) GSA may suspend or terminate collection action in accordance with the terms and procedures contained in 4 CFR part 104.

§ 105-55.009 Referral for litigation.

Claims which cannot be settled under § 105-55.008 or for which collection action cannot be suspended or terminated under 4 CFR parts 103 and 104, will be referred to the General Accounting Office or the Department of Justice, whichever is appropriate, in accordance with the procedures in 4 CFR part 105.

§ 105-55.010 Disclosure to credit reporting agencies and referrals to collection agencies.

The Comptroller and his designees may disclose debtor information to credit reporting agencies and may refer delinquent debts to debt collection agencies under the Federal Claims Collection Act, as amended, and other applicable authorities, provided, however, that no claim arising from the dishonor of any check or other negotiable instrument shall be disclosed to a credit reporting agency or referred to a collection agency without the concurrence of the appropriate Regional Inspector General for Investigations. Information will be disclosed to reporting agencies and referred to debt collection agencies in accordance with the terms and conditions of agreements entered into between GSA and the reporting and collection agencies. The terms and conditions of such agreements shall specify that all of the rights and protections afforded to the debtor under 31 U.S.C. 3711(f) have been fulfilled.

§ 105-55.011 Credit report.

In order to aid the agency in making appropriate determinations as to the collection and compromise of claims; the collection of interest, administrative charges, and penalty charges; the use of administrative offset; the use of other collection methods; and the likelihood of collecting the claim, the Comptroller or his designees may institute a credit investigation of the debtor immediately following receipt of knowledge of the claim.

PART 105-56—SALARY OFFSET FOR INDEBTEDNESS OF GENERAL SERVICES ADMINISTRATION EMPLOYEES TO THE UNITED STATES

Sec.

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105-56.010	Deductions.
105-56.011	Non-waiver of rights.
105-56.012	Refunds.
105-56.013	Coordinating offset with another Federal agency.

AUTHORITY: 5 U.S.C. 5514; Pub. L. 97-365, 96 Stat. 1754.

SOURCE: 53 FR 31864, Aug. 22, 1988, unless otherwise noted.

§ 105-56.001 Scope.

(a) This part covers both internal and Government-wide collections under 5 U.S.C. 5514. It applies when certain debts to the U.S. are recovered by administrative offset from the disposable pay of an employee of the U.S. Government, except in situations where the employee consents to the recovery.

(b) The collection of any amount under this section shall be in accordance with the standards promulgated pursuant to the Federal Claims Collection Act of 1966 (31 U.S.C. 3701 *et seq.*) or in accordance with any other statutory authority for the collection of claims of the U.S. or any Federal agency.

§ 105-56.002 Excluded debts or claims.

This part does not apply to:

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(a) Debts or claims arising under the Internal Revenue Code of 1954 as amended (26 U.S.C. 1 *et seq.*), the Social Security Act (41 U.S.C. 301 *et seq.*), or the tariff laws of the United States.

(b) To any case where collection of a debt by salary offset is explicitly provided for or prohibited by another statute, such as travel advances in 5 U.S.C. 5705 and employee training expenses in 5 U.S.C. 4108. Debt collection procedures under other statutory authorities, however, must be consistent with the provisions of FCCS, defined below..

(c) An employee election of coverage or of a change of coverage under a Federal benefits program which requires periodic deductions from pay if the amount to be recovered was accumulated over four pay periods or less.

§ 105-56.003 Definitions.

The following definitions apply to this part:

“Administrator” means the Administrator of the General Services or the Administrator’s designee.

“Debt” means an amount owed to the United States from sources which include loans insured or guaranteed by the United States and all other amounts due the United States from fees, leases, rents, royalties, services, sales of real or personal property, overpayments, penalties, damages, interest, fines and forfeitures and all other similar sources.

“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 life and health insurance benefits; and such other deductions that are required by law to be withheld.

“Employee” means a current employee of the General Services Administration, or other executive agency.

“FCCS” means the Federal Claims Collection Standards jointly published by the Justice Department and the General Accounting Office at 4 CFR 101.1 *et seq.*

“Pay” means basic pay, special pay, incentive pay, retired pay, retainer pay, or in the case of an individual not

entitled to basic pay, other authorized pay.

“Program official” means a supervisor or management official of the employee’s service or staff office.

“Salary offset” means an administrative offset to collect a debt under 5 U.S.C. 5514 by deduction(s) at one or more officially established pay intervals from the current pay account of an employee without his or her consent.

“Waiver” means the cancellation, remission, forgiveness, or nonrecovery of a debt allegedly owed by an employee to an agency as permitted or required by 5 U.S.C. 5584, 10 U.S.C. 2774 or 32 U.S.C. 716, 5 U.S.C. 8346(b), or any other law.

§ 105-56.004 Pre-offset notice.

The employee is entitled to written notice from an appropriate program officer in his or her employing activity at least 30 days in advance of initiating a deduction from disposable pay informing him or her of:

(a) The nature, origin and amount of the indebtedness determined by the General Services Administration or another agency to be due;

(b) The intention of the agency to initiate proceedings to collect the debt through deductions from the employee’s current disposable pay;

(c) The amount, frequency, proposed beginning date, and duration of the intended deductions;

(d) GSA’s policy concerning how interest is charged and penalties and administrative cost assessed, including a statement that such assessments must be made unless excused under 31 U.S.C. 3717 and the FCCS, 4 CFR 101.1 *et seq.*;

(e) The employee’s right to inspect and copy Government records relating to the debt if Government records of the debt are not attached, or if the employee or his or her representative cannot personally inspect the records, the right to receive a copy of such records. Any costs associated therewith shall be borne by the debtor. The debtor shall give reasonable notice in advance to GSA of the date on which he or she intends to inspect and copy the records involved;

(f) A demand for repayment providing for an opportunity, under terms agreeable to GSA, for the employee to establish a schedule for the voluntary repayment of the debt by offset or to enter into written repayment agreement of the debt in lieu of offset;

(g) The employee's right to request a waiver from the General Accounting Office if a waiver of repayment is authorized by law;

(h) The employee's right to pre-offset hearing conducted by a hearing official arranged by the appropriate program official of his or her employing activity if a petition is filed as prescribed by §105-56.005. Such hearing official will be either an administrative law judge or a hearing official not under the control of the head of the agency and will be designated in accordance with the procedures established in 5 CFR 550.1107;

(i) The method and time period for petitioning for a hearing, including a statement that the timely filing of a petition for hearing will stay the commencement of collection proceedings;

(j) The issuance of a final decision on the hearing, if requested, at the earliest practicable date, but no later than 60 days after the petition is filed unless a delay is requested and granted;

(k) The risk that any knowingly false or frivolous statements, representations, or evidence may subject the employee to:

(1) Disciplinary procedures appropriate under 5 U.S.C. Chapter 75, 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;

(3) Criminal penalties under 18 U.S.C. 286, 287, 1001, and 1002, or any other applicable statutory authority.

(l) Any other rights and remedies available to the employee under statutes or regulations governing the program for which the collection is being made.

(m) The employee's right to a prompt refund if amounts paid or deducted are later waived or found not owed, unless otherwise provided by law;

(n) The specific address to which all correspondence shall be directed regarding the debt.

§ 105-56.005 Employee response.

(a) *Voluntary repayment agreement.* An employee may submit a request to the official who signed the demand letter to enter into a written repayment agreement of the debt in lieu of offset. The request must be made within 7 days of receipt of notice under §105-56.004. The agreement must be in writing, signed by both the employee and the program official making the demand and a signed copy must be sent to the regional finance division serving the program activity. Acceptance of such an agreement is discretionary with the agency. An employee who enters into such an agreement may nevertheless seek a waiver under paragraph (b) of this section.

(b) *Waiver.* Where a waiver of repayment is authorized by law, the employee may request a waiver from the General Accounting Office.

(c) *Reconsideration.* (1) An employee may seek a reconsideration of the Agency's determination regarding the existence or amount of the debt. The request must be submitted to the official who signed the demand letter within 7 days of receipt of notice under §105-56.004. Within 20 days of receipt of this notice, the employee shall submit a detailed statement of reasons for reconsideration which must be accompanied by supporting documentation.

(2) An employee may request a reconsideration of the proposed offset schedule. The request must be submitted to the program official who signed the demand letter within 7 days of receipt of notice under §105-56.004. Within 20 days of receipt of this notice, the employee shall submit an alternative repayment schedule accompanied by a detailed statement supported by documentation evidencing financial hardship resulting from the agency's proposed schedule. Acceptance of the request is discretionary with the agency. The agency must notify the employee in writing of its decision concerning the request to reduce the rate of an involuntary deduction.

§ 105-56.006 Petition for pre-offset hearing.

(a) The employee may petition for a pre-offset hearing by filing a written petition with the program official who

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signed the demand letter within 15 days of receipt of the written notice. The petition must state why the employee believes the agency's determination concerning the existence or amount of the debt is in error, and set forth objections to the involuntary repayment schedule. The timely filing of a petition will suspend the commencement of collection proceedings.

(b) The employee's petition or statement must be signed by the employee.

(c) Petitions for hearing made after the expiration of the 15 day period may be accepted if the employee can show that the delay was because of circumstances beyond his or her control or because of failure to receive notice of the time limit.

(d) If the employee timely requests a pre-offset hearing or the timeliness is waived, the program official must:

(1) Notify the employee whether the employee may elect an oral hearing or whether he or she may have only a "paper hearing," i.e., a review on the written record (see 4 CFR 102.3(c)). In either case, the program official will arrange for a hearing official; and

(2) The program official will provide the hearing official with a copy of all records on which the determination of the debt and any involuntary repayment schedule are based.

(e) An employee who elects an oral hearing must notify the hearing official and the program official in writing within 5 days of receipt of the notice under paragraph (d)(1) of this section and within 20 days of receipt of the notice under (d)(1) the employee shall fully identify and explain with reasonable specificity all the facts, evidence and witnesses which the employee believes support his or her position.

(f) The hearing official shall notify the program official and the employee of the date, time and location of the hearing.

(g) If the employee later elects to have the hearing based only on the written submissions, notification must be given to the hearing official and the program official at least 3 calendar days before the date of the oral hearing. The hearing official may waive the 3-day requirement for good cause.

(h) Failure of the employee to appear at the oral hearing can result in dis-

missal of the petition and affirmation of the agency's decision.

§ 105-56.007 Pre-offset oral hearing.

(a) Oral hearings are informal in nature. The agency, represented by a program official or a representative of the Office of General Counsel, and the employee, or his or her representative, shall explain their case in the form of an oral presentation with reference to the documentation submitted. The employee may testify on his or her own behalf, subject to cross examination. Other witnesses may be called to testify where the hearing official determines the testimony to be relevant and not redundant.

(b) The hearing official shall—

(1) Conduct a fair and impartial hearing; and

(2) Preside over the course of the hearing, maintain decorum, and avoid delay in the disposition of the hearing.

(c) The employee may represent himself or herself or may be represented by another person at the hearing. The employee may not be represented by a person who creates an actual or apparent conflict of interest.

(d) Oral hearings are open to the public. However, the hearing official may close all or any portion of the hearing when doing so is in the best interests of the employee or the public.

(e) Oral hearings may be conducted by conference call at the request of the employee or at the discretion of the hearing official.

§ 105-56.008 Pre-offset "paper hearing."

If a hearing is to be held only upon written submissions, the hearing official shall issue a decision based upon the record and responses submitted by both the agency and the employee.

§ 105-56.009 Written decision.

Within 60 days of filing of the employee's petition for a pre-offset hearing, the hearing official will issue a written decision setting forth: The facts supporting the nature and origin of the debt; the hearing official's analysis, findings and conclusions as to the employee's or agency's grounds, the amount and validity of the debt and the repayment schedule.

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§ 105-56.013

§ 105-56.010 Deductions.

(a) *When deductions may begin.* If the employee filed a petition for hearing with the program official before the expiration of the period provided for in § 105-56.006, then deductions will begin after the hearing official has provided the employee with a hearing, and the final written decision is in favor of the agency. It is the responsibility of the employee's program official to issue the pre-offset notice to the employee and to instruct the National Payroll Center to begin offset in accordance with the final written decision.

(b) *Retired or separated employees.* If the employee retires, resigns, or is terminated before collection of the amount of the indebtedness is completed, the remaining indebtedness will be offset from any subsequent payments of any nature. If the debt cannot be satisfied from subsequent payments, then the debt must be collected according to the procedures for administrative offset pursuant to 31 U.S.C. 3716.

(c) *Types of collection.* A debt may be collected in one lump sum or in installments. Collection will be by lump-sum unless the employee is able to demonstrate to the program official who signed the demand letter that he or she is financially unable to pay in one lump-sum. In these cases, collection will be by installment deductions.

(d) *Methods of collection.* If the debt cannot be collected in one lump sum, the debt will be collected by deductions at officially established pay intervals from an employee's current pay account, unless the employee and the program official agree to an alternative repayment schedule. The alternative arrangement must be in writing and signed by both the employee and the program official.

(1) *Installment deductions.* Installment deductions will be made over the shortest period possible. 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. The installment payment will be sufficient in size and

frequency to pay the debt over the shortest period possible and never to exceed three years. Installment payments of less than \$100 per pay period will be accepted only in the most unusual circumstances.

(2) *Sources of deductions.* GSA will make deductions only from 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.

(e) Interest, penalties and administrative costs on debts under this part will be assessed according to the provisions of 4 CFR 102.13.

§ 105-56.011 Non-waiver of rights.

An employee's involuntary payment of all or any portion of a debt being collected under 5 U.S.C. 5514 shall not be construed as a waiver of any rights which the employee may have under 5 U.S.C. 5514 or any other provision of contract or law unless there are statutory or contractual provisions to the contrary.

§ 105-56.012 Refunds.

GSA 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) GSA is directed by an administrative or judicial order to refund amounts deducted from the employee's current pay.

§ 105-56.013 Coordinating offset with another Federal agency.

(a) *When GSA is owed the debt.* When GSA is owed a debt by an employee of another agency, the other agency shall not initiate the requested offset until GSA provides the agency with a written certification that the debtor owes GSA a debt and that GSA has complied with these regulations. This certification shall include the amount and basis of the debt and the due date of the payment.

(b) *When another agency is owed the debt.* GSA may use salary offset against one of its employees who is indebted to another agency if requested to do so by that agency. Any such request must be

accompanied by a certification from the requesting agency that the person owes the debt, the amount of the debt and that the employee has been given the procedural rights required by 5 U.S.C. 5514 and 5 CFR part 550, subpart K.

PART 105-57—COLLECTION OF DEBTS BY TAX REFUND OFFSET

Sec.	
105-57.001	Purpose.
105-57.002	Applicability and scope.
105-57.003	Administrative charges.
105-57.004	Reasonable attempt to notify.
105-57.005	Notice requirement before offset.
105-57.006	Consideration of evidence.
105-57.007	Change in conditions after submission to IRS.

AUTHORITY: 31 U.S.C. 3720A.

SOURCE: 59 FR 1277, Jan. 10, 1994, unless otherwise noted.

§ 105-57.001 Purpose.

This part establishes procedures for the General Services Administration (GSA) to refer past due debts to the Internal Revenue Service (IRS) for offset against income tax refunds of taxpayers owing debts to GSA.

§ 105-57.002 Applicability and scope.

(a) This part implements 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) Has been delinquent for at least three months but, except in the case of a judgment debt, has not been delinquent more than ten years at the time the offset is made;

(2) With respect to which, GSA 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, has considered such evidence, and has determined that the debt is past due and legally enforceable;

(3) Cannot be currently collected pursuant to the salary offset provisions of 5 U.S.C. 5514(a)(1);

(4) Cannot be currently collected pursuant to the administrative offset provisions of 31 U.S.C. 3716;

(5) Has been disclosed by GSA to a credit reporting agency, including a consumer reporting agency as authorized by 31 U.S.C. 3711(f);

(6) With respect to which, GSA 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 income tax refunds due the taxpayer;

(7) Is at least \$25.00;

(8) All other requirements of 31 U.S.C. 3720A and the Department of the Treasury regulations relating to eligibility of a debt for tax refund offset, at 26 CFR 301.6402-6T, have been satisfied.

§ 105-57.003 Administrative charges.

All administrative charges incurred in connection with the referral of debts to the IRS will be added to the debt, thus increasing the amount of the offset.

§ 105-57.004 Reasonable attempt to notify.

In order to constitute a reasonable attempt to notify the debtor, GSA must have used a mailing address for the debtor obtained from the IRS pursuant to the Internal Revenue Code, 26 U.S.C. 6103 (m)(2) or (m)(4), within one year preceding the attempt to notify the debtor.

§ 105-57.005 Notice requirement before offset.

The notification provided by GSA to the debtor will inform the debtor how to go about presenting evidence to GSA that all or part of the debt is either not past due or is not legally enforceable.

§ 105-57.006 Consideration of evidence.

Evidence submitted by the debtor will be considered by officials or employees of GSA. Any determination that an amount of such debt is past due and legally enforceable will be made by such officials or employees. Evidence that the debt is affected by a bankruptcy proceeding involving the debtor shall bar referral of the debt.

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§ 105–57.007 Change in conditions after submission to IRS.

If the amount of a debt is reduced after submission by GSA and offset by IRS, GSA will refund to the debtor any excess amount and will promptly notify IRS of the refund. GSA will also promptly notify the IRS if, after submission of a debt to the IRS for offset, GSA:

- (a) Determines that an error has been made with respect to the information submitted;
- (b) Receives a payment or credits a payment to an account submitted; or
- (c) Receives notification that the debtor has filed for bankruptcy under title 11 of the United States Code or has been adjudicated bankrupt and the debt has been discharged.

PART 105–60—PUBLIC AVAILABILITY OF AGENCY RECORDS AND INFORMATIONAL MATERIALS

Sec.

105–60.000 Scope of part.

Subpart 105–60.1—General Provisions

- 105–60.101 Purpose.
- 105–60.102 Application.
- 105–60.103 Policy.
- 105–60.103–1 Availability of records.
- 105–60.103–2 Applying exemptions.
- 105–60.104 Records of other agencies.

Subpart 105–60.2—Publication of General Agency Information and Rules in the Federal Register

- 105–60.201 Published information and rules.
- 105–60.202 Published materials available for sale to the public.

Subpart 105–60.3—Availability of Opinions, Orders, Policies, Interpretations, Manuals, and Instructions

- 105–60.301 General.
- 105–60.302 Available materials.
- 105–60.303 Rules for public inspection and copying.
- 105–60.304 Public information handbook and index.
- 105–60.305 Fees.
- 105–60.305–1 Definitions.
- 105–60.305–2 Scope of this subpart.
- 105–60.305–3 GSA records available without charge.
- 105–60.305–4 GSA records available at a fee.
- 105–60.305–5 Searches.
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- 105–60.305–7 Assurance of payment.
- 105–60.305–8 Prepayment of fees.
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- 105–60.305–10 Fee schedule.
- 105–60.305–11 Fees for authenticated and attested copies.
- 105–60.305–12 Administrative actions to improve assessment and collection of fees.
- 105–60.305–13 Waiver of fee.

Subpart 105–60.4—Described Records

- 105–60.401 General.
- 105–60.402 Procedures for making records available.
- 105–60.402–1 Submission of requests.
- 105–60.402–2 Response to initial requests.
- 105–60.403 Appeal within GSA.
- 105–60.404 Extension of time limits.
- 105–60.405 Processing requests for confidential commercial information.

Subpart 105–60.5—Exemptions

- 105–60.501 Categories of records exempt from disclosure under the FOIA.

Subpart 105–60.6—Production or Disclosure by Present or Former General Services Administration Employees in Response to Subpoenas or Similar Demands in Judicial or Administrative Proceedings

- 105–60.601 Purpose and scope of subpart.
- 105–60.602 Definitions.
- 105–60.603 Acceptance of service of a subpoena duces tecum or other legal demand on behalf of the General Services Administration.
- 105–60.604 Production or disclosure prohibited unless approved by the Appropriate Authority.
- 105–60.605 Procedure in the event of a demand for production or disclosure.
- 105–60.606 Procedure where response to demand is required prior to receiving instructions.
- 105–60.607 Procedure in the event of an adverse ruling.
- 105–60.608 Fees, expenses, and costs.

AUTHORITY: 5 U.S.C. 301 and 552; 40 U.S.C. 486(c).

SOURCE: 63 FR 56839, Oct. 23, 1998, unless otherwise noted.

§ 105–60.000 Scope of part.

(a) This part sets forth policies and procedures of the General Services Administration (GSA) regarding public access to records documenting:

(1) Agency organization, functions, decisionmaking channels, and rules and regulations of general applicability;

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(2) Agency final opinions and orders, including policy statements and staff manuals;

(3) Operational and other appropriate agency records; and

(4) Agency proceedings.

(b) This part also covers exemptions from disclosure of these records; procedures for the public to inspect or obtain copies of GSA records; and instructions to current and former GSA employees on the response to a subpoena or other legal demand for material or information received or generated in the performance of official duty or because of the person's official status.

(c) Any policies and procedures in any GSA internal or external directive inconsistent with the policies and procedures set forth in this part are superseded to the extent of that inconsistency.

Subpart 105-60.1—General Provisions

§ 105-60.101 Purpose.

This part 105-60 implements the provisions of the Freedom of Information Act (FOIA), as amended, 5 U.S.C. 552. The regulations in this part also implement Executive Order 12600, Predisclosure Notification Procedures for Confidential Commercial Information, of June 23, 1987 (3 CFR, 1987 Comp., p. 235). This part prescribes procedures by which the public may inspect and obtain copies of GSA records under the FOIA, including administrative procedures which must be exhausted before a requester invokes the jurisdiction of an appropriate United States District Court for GSA's failure to respond to a proper request within the statutory time limits, for a denial of agency records or challenge to the adequacy of a search, or for a denial of a fee waiver.

§ 105-60.102 Application.

This part applies to all records and informational materials generated, maintained, and controlled by GSA that come within the scope of 5 U.S.C. 552.

41 CFR Ch. 105 (7-1-01 Edition)

§ 105-60.103 Policy.

§ 105-60.103-1 Availability of records.

The policies of GSA with regard to the availability of records to the public are:

(a) GSA records are available to the greatest extent possible in keeping with the spirit and intent of the FOIA. GSA will disclose information in any existing GSA record, with noted exceptions, regardless of the form or format of the record. GSA will provide the record in the form or format requested if the record is reproducible by the agency in that form or format without significant expenditure of resources. GSA will make reasonable efforts to maintain its records in forms or formats that are reproducible for purposes of this section.

(b) The person making the request does not need to demonstrate an interest in the records or justify the request.

(c) The FOIA does not give the public the right to demand that GSA compile a record that does not already exist. For example, FOIA does not require GSA to collect and compile information from multiple sources to create a new record. GSA may compile records or perform minor reprogramming to extract records from a database or system when doing so will not significantly interfere with the operation of the automated system in question or involve a significant expenditure of resources.

(d) Similarly, FOIA does not require GSA to reconstruct records that have been destroyed in compliance with disposition schedules approved by the Archivist of the United States. However, GSA will not destroy records after a member of the public has requested access to them and will process the request even if destruction would otherwise be authorized.

(e) If the record requested is not complete at the time of the request, GSA may, at its discretion, inform the requester that the complete record will be provided when it is available, with no additional request required, if the record is not exempt from disclosure.

(f) Requests must be addressed to the office identified in § 105-60.402-1.

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(g) Fees for locating and duplicating records are listed in § 105-60,305-10.

§ 105-60.103-2 Applying exemptions.

GSA may deny a request for a GSA record if it falls within an exemption under the FOIA outlined in subpart 105-60.5 of this part. Except when a record is classified or when disclosure would violate any Federal statute, the authority to withhold a record from disclosure is permissive rather than mandatory. GSA will not withhold a record unless there is a compelling reason to do so; i.e., disclosure will likely cause harm to a Governmental or private interest. In the absence of a compelling reason, GSA will disclose a record even if it otherwise is subject to exemption. GSA will cite the compelling reason(s) to requesters when any record is denied under FOIA.

§ 105-60.104 Records of other agencies.

If GSA receives a request for access to records that are known to be the primary responsibility of another agency, GSA will refer the request to the agency concerned for appropriate action. For example, GSA will refer requests to the appropriate agency in cases in which GSA does not have sufficient knowledge of the action or matter that is the subject of the requested records to determine whether the records must be released or may be withheld under one of the exemptions listed in Subpart 105-60.5 of this part. If GSA does not have the requested records, the agency will attempt to determine whether the requested records exist at another agency and, if possible, will forward the request to that agency. GSA will inform the requester that GSA has forwarded the request to another agency.

Subpart 105-60.2—Publication of General Agency Information and Rules in the Federal Register

§ 105-60.201 Published information and rules.

In accordance with 5 U.S.C. 552(a)(1), GSA publishes in the FEDERAL REGISTER, for the guidance of the public,

the following general information concerning GSA:

(a) Description of the organization of the Central Office and regional offices and the established places at which, the employees from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(b) Statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(c) Rules of procedure, descriptions of forms available or the places where forms may be obtained, and instructions on the scope and contents of all papers, reports, or examinations;

(d) Substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by GSA; and

(e) Each amendment, revision, or repeal of the materials described in this section.

§ 105-60.202 Published materials available for sale to the public.

(a) Substantive rules of general applicability adopted by GSA as authorized by law that this agency publishes in the FEDERAL REGISTER and which are available for sale to the public by the Superintendent of Documents at pre-established prices are: The General Services Administration Acquisition Regulation (48 CFR Ch. 5), the Federal Acquisition Regulation (48 CFR Ch. 1), the Federal Property Management Regulations (41 CFR Ch. 101), and the Federal Travel Regulation (41 CFR Ch. 301-304).

(b) GSA provides technical information, including manuals and handbooks, to other Federal entities, e.g., the National Technical Information Service, with separate statutory authority to make information available to the public at pre-established fees.

(c) Requests for information available through the sources in paragraphs (a) and (b) of this section will be referred to those sources.

§ 105-60.301

41 CFR Ch. 105 (7-1-01 Edition)

Subpart 105-60.3—Availability of Opinions, Orders, Policies, Interpretations, Manuals, and Instructions

§ 105-60.301 General.

GSA makes available to the public the materials described under 5 U.S.C. 552(a)(2), which are listed in §105-60.302 through an extensive electronic home page, <http://www.gsa.gov/>. A public handbook listing those materials as described in §105-60.304 is available at GSA's Central Office in Washington, DC, and at the website at <http://www.gsa.gov/staff/c/ca/publ.htm>. Members of the public who do not have the means to access this information electronically, and who are not located in the Washington, DC area, may contact the Freedom of Information Act office in any of the regional offices listed in this regulation. These offices will make arrangements for members of the public to access the information at a computer located at the FOIA office. Reasonable copying services are provided at the fees specified in §105-60.305.

§ 105-60.302 Available materials.

GSA materials available under this subpart 105-60.3 are as follows:

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

(b) Those statements and policy and interpretations that have been adopted by GSA and are not published in the FEDERAL REGISTER.

(c) Administrative staff manuals and instructions to staff affecting a member of the public unless these materials are promptly published and copies offered for sale.

§ 105-60.303 Rules for public inspection and copying.

(a) *Locations.* Selected areas containing the materials available for public inspection and copying, described in this §105-60.302, are located in the following places:

Central Office (GSA Headquarters),
General Services Administration, Washington, DC.
Telephone: 202-501-2262
FAX: 202-501-2727,
Email: gsa.foia@gsa.gov

1800 F Street, NW. (CAI), Washington, DC 20405
Office of the Inspector General
FOIA Officer, Office of Inspector General (J)
General Services Administration
1800 F Street NW., Room 5324
Washington, DC 20405
New England Region
General Services Administration (1AB)
(Comprised of the States of Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont)
Thomas P. O'Neill, Jr., Federal Building,
10 Causeway Street, Boston, MA 02222
Telephone: 617-565-8100
FAX: 617-565-8101
Northeast and Caribbean Region
(Comprised of the States of New Jersey, New York, the Commonwealth of Puerto Rico, and the Virgin Islands)
General Services Administration (2AR)
26 Federal Plaza, New York, NY 10278
Telephone: 212-264-1234
FAX: 212-264-2760
Mid-Atlantic Region
(Comprised of the States of Delaware, Maryland, Pennsylvania, Virginia, and West Virginia, excluding the Washington, DC metropolitan area)
General Services Administration (3ADS),
100 Penn Square East, Philadelphia, PA 19107
Telephone: 215-656-5530
FAX: 215-656-5590
Southeast Sunbelt Region
(Comprised of the States of Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, and Tennessee)
General Services Administration (4E), 401 West Peachtree Street, Atlanta, GA 30365
Telephone: 404-331-5103
FAX: 404-331-1813
Great Lakes Region
(Comprised of the States of Illinois, Indiana, Ohio, Minnesota, Michigan, and Wisconsin)
General Services Administration (5ADB),
230 South Dearborn Street, Chicago, IL 60604
Telephone: 312-353-5383
FAX: 312-353-5385
Heartland Region
(Comprised of the States of Iowa, Kansas, Missouri, and Nebraska)
General Services Administration (6ADB),
1500 East Bannister Road, Kansas City, MO 64131
Telephone: 816-926-7203
FAX: 816-823-1167
Greater Southwest Region
(Comprised of the States of Arkansas, Louisiana, New Mexico, Texas, and Oklahoma)
General Services Administration (7ADQ),
819 Taylor Street, Fort Worth, TX 76102

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Telephone: 817-978-3902

FAX: 817-978-4867

Rocky Mountain Region

(Comprised of the States of Colorado, North Dakota, South Dakota, Montana, Utah, and Wyoming)

Business Service Center, General Services Administration (8PB-B), Building 41, Denver Federal Center, Denver, CO 80225

Telephone: 303-236-7408

FAX: 303-236-7403

Pacific Rim Region

(Comprised of the States of Hawaii, California, Nevada, Arizona, Guam, and Trust Territory of the Pacific)

Business Service Center, General Services Administration (9ADB), 525 Market Street, San Francisco, CA 941105

Telephone: 415-522-2715

FAX: 415-522-2705

Northwest/Arctic Region

(Comprised of the States of Alaska, Idaho, Oregon, and Washington)

General Services Administration (10L), GSA Center, 15th and C Streets, SW., Auburn, WA 98002

Telephone: 206-931-7007

FAX: 206-931-7195

National Capital Region

(Comprised of the District of Columbia and the surrounding metropolitan area)

General Services Administration (WPFA-L), 7th and D Streets SW., Washington, DC 20407

Telephone: 202-708-5854

FAX: 202-708-4655.

(b) *Time*. The offices listed above will be open to the public during the business hours of the GSA office where they are located.

(c) *Reproduction services and fees*. The GSA Central Office or the Regional Business Service Centers will furnish reasonable copying and reproduction services for available materials at the fees specified in § 105-60.305.

§ 105-60.304 Public information handbook and index.

GSA publishes a handbook for the public that identifies information regarding any matter described in § 105-60.302. This handbook also lists published information available from GSA and describes the procedures the public may use to obtain information using the Freedom of Information Act (FOIA). This handbook may be obtained without charge from any of the GSA FOIA offices listed in § 105-60.303(a), or at the GSA Internet Homepage (<http://www.gsa.gov/staff/c/ca/cai/links.htm>).

§ 105-60.305 Fees.

§ 105-60.305-1 Definitions.

For the purpose of this part:

(a) A statute specifically providing for setting the level of fees for particular types of records (5 U.S.C. 552(a)(4)(A)(vii)) means any statute that specifically requires a Government agency to set the level of fees for particular types of records, as opposed to a statute that generally discusses such fees. Fees are required by statute to:

(1) Make Government information conveniently available to the public and to private sector organizations;

(2) Ensure that groups and individuals pay the cost of publications and other services which are for their special use so that these costs are not borne by the general taxpaying public;

(3) Operate an information dissemination activity on self-sustaining basis to the maximum extent possible; or

(4) Return revenue to the Treasury for defraying, wholly or in part, appropriated funds used to pay the cost of disseminating Government information.

(b) The term *direct costs* means those expenditures which GSA actually incurs in searching for and duplicating (and in the case of commercial requesters, reviewing and redacting) documents to respond to a FOIA request. Direct costs include, for example, the salary of the employee performing the 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. Overhead expenses such as costs of space, and heating or lighting the facility where the records are stored are not included in direct costs.

(c) The term *search* includes all time spent looking for material that is responsive to a request, including line-by-line identification of material within documents. Searches will be performed in the most efficient and least expensive manner so as to minimize costs for both the agency and the requester. Line-by-line searches will not be undertaken when it would be more efficient to duplicate the entire document. *Search* for responsive material is not the same as *review* of a record to

determine whether it is exempt from disclosure in whole or in part (see paragraph (e) of this section. Searches may be done manually or by computer using existing programming or new programming when this would not significantly interfere with the operation of the automated system in question.

(d) The term *duplication* means the process of making a copy of a document in response to a FOIA request. Copies can take the form of paper, microform audiovisual materials, or magnetic tapes or disks. To the extent practicable, GSA will provide a copy of the material in the form specified by the requester.

(e) The term *review* means the process of examining documents located in response to a request to determine if any portion of that document is permitted to be withheld and processing any documents for disclosure. See § 105-60.305-6.

(f) The term *commercial-use request* means 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 person on whose behalf the request is made. GSA will determine whether a requester properly belongs in this category by determining how the requester will use the documents.

(g) The term *educational institution* means 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, or an institution of vocational education which operates a program or programs of scholarly research.

(h) The term *noncommercial scientific institution* means an institution that is not operated on a "commercial" basis as that term is used in paragraph (f) 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 product or industry.

(i) The term *representative of the news media* means 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 cur-

rent events or that would be of current interest to the public. Examples of news media 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. "Freelance" journalists will be regarded as working for a news organization if they can demonstrate a solid basis for expecting publication through that organization even though they are not actually employed by it.

§ 105-60.305-2 Scope of this subpart.

This subpart sets forth policies and procedures to be followed in the assessment and collection of fees from a requester for the search, review, and reproduction of GSA records.

§ 105-60.305-3 GSA records available without charge.

GSA records available to the public are displayed in the Business Service Center for each GSA region. The address and phone number of the Business Service Centers are listed in § 105-60.303. Certain material related to bids (excluding construction plans and specifications) and any material displayed are available without charge upon request.

§ 105-60.305-4 GSA records available at a fee.

(a) GSA will make a record not subject to exemption available at a time and place mutually agreed upon by GSA and the requester at fees shown in § 105-60.305-10. Waivers of these fees are available under the conditions described in § 105-60.305-13. GSA will agree to:

- (1) Show the originals to the requester;
- (2) Make one copy available at a fee; or
- (3) A combination of these alternatives.

(b) GSA will make copies of voluminous records as quickly as possible. GSA may, in its discretion, make a reasonable number of additional copies for a fee when commercial reproduction services are not available to the requester.

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§ 105-60.305-5 Searches.

(a) GSA may charge for the time spent in the following activities in determining “search time” subject to applicable fees as provided in § 105-60.305-10:

(1) Time spent in trying to locate GSA records which come within the scope of the request;

(2) Time spent in either transporting a necessary agency searcher to a place of record storage, or in transporting records to the locations of a necessary agency searcher; and

(3) Direct costs of the use of computer time to locate and extract requested records.

(b) GSA will not charge for the time spent in monitoring a requester’s inspection of disclosed agency records.

(c) GSA may assess fees for search time even if the search proves unsuccessful or if the records located are exempt from disclosure.

§ 105-60.305-6 Reviews.

(a) GSA will charge only commercial-use requesters for review time.

(b) GSA will charge for the time spent in the following activities in determining “review time” subject to applicable fees as provided in § 105-60.305-10:

(1) Time spent in examining a requested record to determine whether any or all of the record is exempt from disclosure, including time spent consulting with submitters of requested information; and

(2) Time spent in deleting exempt matter being withheld from records otherwise made available.

(c) GSA will not charge for:

(1) Time spent in resolving issues of law or policy regarding the application of exemptions; or

(2) Review at the administrative appeal level of an exemption already applied. However, records or portions of records withheld in full under an exemption which is subsequently determined not to apply may be reviewed again to determine the applicability of other exemptions not previously considered. GSA will charge for such subsequent review.

§ 105-60.305-7 Assurance of payment.

If fees for search, review, and reproduction will exceed \$25 but will be less than \$250, the requester must provide written assurance of payment before GSA will process the request. If this assurance is not included in the initial request, GSA will notify the requester that assurance of payment is required before the request is processed. GSA will offer requesters an opportunity to modify the request to reduce the fee.

§ 105-60.305-8 Prepayment of fees.

(a) *Fees over \$250.* GSA will require prepayment of fees for search, review, and reproduction which are likely to exceed \$250. When the anticipated total fee exceeds \$250, the requester will receive notice to prepay and at the same time will be given an opportunity to modify his or her request to reduce the fee. When fees will exceed \$250, GSA will notify the requester that it will not start processing a request until payment is received.

(b) *Delinquent payments.* As noted in § 105-6.305-12(d), requesters who are delinquent in paying for previous requests will be required to repay the old debt and to prepay for any subsequent request. GSA will inform the requester that it will process no additional requests until all fees are paid.

§ 105-60.305-9 Form of payment.

Requesters should pay fees by check or money order made out to the General Services Administration and addressed to the official named by GSA in its correspondence. Payment may also be made by means of Mastercard or Visa. For information concerning payment by credit cards, call 816-926-7551.

§ 105-60.305-10 Fee schedule.

(a) When GSA is aware that documents responsive to a request are maintained for distribution by an agency operating a statutory fee based program, GSA will inform the requester of the procedures for obtaining records from those sources.

(b) GSA will consider only the following costs in fees charged to requesters of GSA records:

(1) Review and search fees.

Manual searches by clerical staff: \$13 per hour or fraction of an hour.

Manual searches and reviews by professional staff in cases in which clerical staff would be unable to locate the requested records: \$29 per hour or fraction of an hour.

Computer searches: Direct cost to GSA.

Transportation or special handling of records: Direct cost to GSA.

(2) Reproduction fees.

Pages no larger than 8½ by 14 inches, when reproduced by routine electrostatic copying: 10¢ per page.

Pages over 8½ by 14 inches: Direct cost of reproduction to GSA.

Pages requiring reduction, enlargement, or other special services: Direct cost of reproduction to GSA.

Reproduction by other than routine electrostatic copying: Direct cost of reproduction to GSA.

(c) Any fees not provided for under paragraph (b) of this section, shall be calculated as direct costs, in accordance with §105-60.305-1(b).

(d) GSA will assess fees based on the category of the requester as defined in §105-60.305-1(f)-(1); i.e., commercial-use, educational and noncommercial scientific institutions, news media, and all other. The fees listed in paragraph (b) of this section apply with the following exceptions:

(1) GSA will not charge the requester if the fee is \$25 or less as the cost of collection is greater than the fee.

(2) Educational and noncommercial scientific institutions and the news media will be charged for the cost of reproduction alone. These requesters are entitled to the first 100 pages (paper copies) of duplication at no cost. The following are examples of how these fees are calculated:

(i) A request that results in 150 pages of material. No fee would be assessed for duplication of 150 pages. The reason is that these requesters are entitled to the first 100 pages at no charge. The charge for the remaining 50 pages would be \$5.00. This amount would not be billed under the preceding section.

(ii) A request that results in 450 pages of material. The requester in this case would be charged \$35.00. The reason is that the requester is entitled to the first 100 pages at no charge. The charge for the remaining 350 pages would be \$35.

(3) Noncommercial requesters who are not included under paragraph (d)(2) of this section will be entitled to the first 100 pages (page copies) of duplication at not cost and two hours of search without charge. The term *search time* generally refers to manual search. To apply this term to searches made by computer, GSA will determine the hourly cost of operating the central processing unit and the operator's hourly salary plus 16 percent. When the cost of search (including the operator time and the cost of operating the computer to process a request) reaches the equivalent dollar amount of two hours of the salary of the person performing a manual search, i.e., the operator, GSA will begin assessing charges for computer search.

(4) GSA will charge commercial-use requesters fees which recover the full direct costs of searching for, reviewing for release, and duplicating the records sought. Commercial-use requesters are not entitled to two hours of free search time.

(e) Determining category of requester. GSA may ask any requester to provide additional information at any time to determine what fee category he or she falls under.

§105-60.305-11 Fees for authenticated and attested copies.

The fees set forth in §105-60.305-10 apply to requests for authenticated and attested copies of GSA records.

§105-60.305-12 Administrative actions to improve assessment and collection of fees.

(a) *Charging interest.* GSA may charge requesters who fail to pay fees interest on the amount billed starting on the 31st day following the day on which the billing was sent. Interest will be at the rate prescribed in 31 U.S.C. 3717.

(b) *Effect of the Debt Collection Act of 1982.* GSA will take any action authorized by the Debt Collection Act of 1982 (Pub. L. 97-365, 96 Stat. 1749), including disclosure to consumer reporting agencies, use of collection agencies, and assessment of penalties and administrative costs, where appropriate, to encourage payment.

(c) *Aggregating requests.* When GSA reasonably believes that a requester, or

group of requesters acting in concert, is attempting to break down a request into a series of requests related to the same subject for the purpose of evading the assessment of fees, GSA will combine any such requests and charge accordingly, including fees for previous requests where charges were not assessed. GSA will presume that multiple requests of this type within a 30-day period are made to avoid fees.

(d) *Advanced payments.* Whenever a requester is delinquent in paying the fee for a previous request (i.e., within 30 days of the date of the billing), GSA will require the requester to pay the full amount owed plus any applicable interest penalties and administrative costs as provided in paragraph (a) of this section or to demonstrate that he or she has, in fact, paid the fee. In such cases, GSA will also require advance payment of the full amount of the estimated fee before the agency begins to process a new request or a pending request from that requester. When advance payment is required under this selection, the administrative time limits in subsection (a)(6) of the FOIA (i.e., 10 working days from receipt of appeals from initial denial plus permissible time extensions) will begin only after GSA has received the fee payments described in § 105-60.305-8.

§ 105-60.305-13 Waiver of fee.

(a) Any request for a waiver or the reduction of a fee should be included in the initial letter requesting access to GSA records under § 105-60.402-1. The waiver request should explain how disclosure of the information would contribute significantly to public's understanding of the operations or activities of the Government and would not be primarily in the commercial interest of the requester. In responding to a requester, GSA will consider the following factors:

(1) Whether the subject of the requested records concerns "the operations or activities of the Government." The subject matter of the requested records must specifically concern identifiable operations or activities of the Federal Government. The connection between the records and the operations or activities must be direct and clear, not remote or attenuated.

(2) Whether the disclosure is "likely to contribute" to an understanding of Government operations or activities. In this connection, GSA will consider whether the requested information is already in the public domain. If it is, then disclosure of the information would not be likely to contribute to an understanding of Government operations or activities, as nothing new would be added to the public record.

(3) Whether disclosure of the requested information will contribute to "public's understanding." The focus here must be on the contribution to public's understanding rather than personal benefit to be derived by the requester. For purposes of this analysis, the identity and qualifications of the requester should be considered to determine whether the requester is in a position to contribute to public's understanding through the requested disclosure.

(4) Whether the requester has a commercial interest that would be furthered by the requested disclosure; and if so: whether the magnitude of the identified commercial interest of the requester is sufficiently large, in comparison with the public's interest in disclosure, that disclosure is "primarily in the commercial interest of the requester."

(b) GSA will ask the requester to furnish additional information if the initial request is insufficient to evaluate the merits of the request. GSA will not start processing a request until the fee waiver issue has been resolved unless the requester has provided written assurance of payment in full if the fee waiver is denied by the agency.

Subpart 105-60.4—Described Records

§ 105-60.401 General.

(a) Except for records made available in accordance with subparts 105-60.2 and 105-60.3 of this part, GSA will make records available to a requester promptly when the request reasonably describes the records unless GSA invokes an exemption in accordance with subpart 105-60.5 of this part. Although the burden of reasonable description of the records rests with the requester,

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whenever practical GSA will assist requesters to describe records more specifically.

(b) Whenever a request does not reasonably describe the records requested, GSA may contact the requester to seek a more specific description. The 20-workday time limit set forth in §105-60.402-2 will not start until the official identified in §105-60.402-1 or other responding official receives a request reasonably describing the records.

§105-60.402 Procedures for making records available.

This subpart sets forth initial procedures for making records available when they are requested, including administrative procedures to be exhausted prior to seeking judicial review by an appropriate United States District Court.

§105-60.402-1 Submission of requests.

For records located in the GSA Central Office, the requester must submit a request in writing to the GSA FOIA Officer, General Services Administration (CAI), Washington, DC 20405. Requesters may FAX requests to (202) 501-2727, or submit a request by electronic mail to gsa.foi@gsa.gov. For records located in the Office of Inspector General, the requester must submit a request to the FOIA Officer, Office of Inspector General, General Services Administration, 1800 F Street NW., Room 5324, Washington, DC 20405. For records located in the GSA regional offices, the requester must submit a request to the FOIA Officer for the relevant region, at the address listed in §105-60.303(a). Requests should include the words "Freedom of Information Act Request" prominently marked on both the face of the request letter and the envelope. The 20-workday time limit for agency decisions set forth in §105-60.402-2 begins with receipt of a request in the office of the official identified in this section, unless the provisions under §§105-60.305-8 and 105-60.305-12(d) apply. Failure to include the words "Freedom of Information Act Request" or to submit a request to the official identified in this section will result in processing delays. A requester with questions concerning a FOIA request should contact the GSA FOIA Office, General Services

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Administration (CAI), 18th and F Streets, NW., Washington, DC 20405, (202) 501-2262.

§105-60.402-2 Response to initial requests.

(a) GSA will respond to an initial FOIA request that reasonably describes requested records, including a fee waiver request, within 20 workdays (that is, excluding Saturdays, Sundays, and legal holidays) after receipt of a request by the office of the appropriate official specified in §105-60.402-1. This letter will provide the agency's decision with respect to disclosure or non-disclosure of the requested records, or, if appropriate, a decision on a request for a fee waiver. If the records to be disclosed are not provided with the initial letter, the records will be sent as soon as possible thereafter.

(b) In unusual circumstances, as described in §105-60.404, GSA will inform the requester of the agency's need to take an extension of time, not to exceed an additional 10 workdays. This notice will afford requesters an opportunity to limit the scope of the request so that it may be processed within prescribed time limits or an opportunity to arrange an alternative time frame for processing the request or a modified request. Such mutually agreed time frames will supersede the 10 day limit for extensions.

(c) GSA will consider requests for expedited processing from requesters who submit a statement describing a compelling need and certifying that this need is true and correct to the best of such person's knowledge and belief. A *compelling need* means:

(1) Failure to obtain the records on an expedited basis could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or

(2) The information is urgently needed by an individual primarily engaged in disseminating information in order to inform the public concerning actual or alleged Federal Government activity. An individual primarily engaged in disseminating information means a person whose primary activity involves publishing or otherwise disseminating information to the public. "Urgently needed" information has a particular

value that will be lost if not disseminated quickly, such as a breaking news story or general public interest. Information of historical interest only, or information sought for litigation or commercial activities would not qualify, nor would a news media publication or broadcast deadline unrelated to the newsbreaking nature of the information.

(d) GSA will decide whether to grant expedited processing within five working days of receipt of the request. If the request is granted, GSA will process the request ahead of non-expedited requests, as soon as practicable. If the request is not granted, GSA will give expeditious consideration to administrative appeals of this denial.

(e) GSA may, at its discretion, establish three processing queues based on whether any requests have been granted expedited status and on the difficulty and complexity of preparing a response. Within each queue, responses will be prepared on a "first in, first out" basis. One queue will be made up of expedited requests; the second, of simple responses that clearly can be prepared without requesting an extension of time; the third, of responses that will require an extension of time.

§ 105-60.403 Appeal within GSA.

(a) A requester who receives a denial of a request, in whole or in part, a denial of a request for expedited processing or of a fee waiver request may appeal that decision within GSA. A requester may also appeal the adequacy of the search if GSA determines that it has searched for but has not requested records. The requester must send the appeal to the GSA FOIA Officer, General Services Administration (CAI), Washington, DC 20405, regardless of whether the denial being appealed was made in the Central Office or in a regional office. For denials which originate in the Office of Inspector General, the requester must send the appeal to the Inspector General, General Services Administration, 1800 F Street NW., Washington, DC 20405.

(b) The GSA FOIA Officer must receive an appeal no later than 120 calendar days after receipt by the requester of the initial denial of access or fee waiver.

(c) An appeal must be in writing and include a brief statement of the reasons he or she thinks GSA should release the records or provide expedited processing and enclose copies of the initial request and denial. The appeal letter must include the words "Freedom of Information Act Appeal" on both the face of the appeal letter and on the envelope. Failure to follow these procedures will delay processing of the appeal. GSA has 20 workdays after receipt of a proper appeal of denial of records to issue a determination with respect to the appeal. The 20-workday time limit shall not begin until the GSA FOIA Officer receives the appeal. As noted in §105-60.404, the GSA FOIA Officer may extend this time limit in unusual circumstances. GSA will process appeals of denials of expedited processing as soon as possible after receiving them.

(d) A requester who receives a denial of an appeal, or who has not received a response to an appeal or initial request within the statutory time frame may seek judicial review in the United States District Court in the district in which the requester resides or has a principal place of business, or where the records are situated, or in the United States District Court for the District of Columbia.

§ 105-60.404 Extension of time limits.

(a) In unusual circumstances, the GSA FOIA Officer or the regional FOIA Officer may extend the time limits prescribed in §§105-60.402 and 105-60.403. For purposes of this section, the term *unusual circumstances* means:

(1) 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;

(2) The need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are described in a single request;

(3) The need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or

more components of GSA having substantial subject-matter interest therein; or

(4) The need to consult with the submitter of the requested information.

(b) If necessary, GSA may take more than one extension of time. However, the total extension of time to respond to any single request shall not exceed 10 workdays. The extension may be divided between the initial and appeal stages or within a single stage. GSA will provide written notice to the requester of any extension of time limits.

§ 105-60.405 Processing requests for confidential commercial information.

(a) *General.* The following additional procedures apply when processing requests for confidential commercial information.

(b) *Definitions.* For the purposes of this section, the following definitions apply:

(1) *Confidential commercial information* means records provided to the Government by a submitter that contain material arguably exempt from release under 5 U.S.C. 552(b)(4), because disclosure could reasonably be expected to cause substantial competitive harm.

(2) *Submitter* means a person or entity which provides to the Government information which may constitute confidential commercial information. The term *submitter* includes, but is not limited to, individuals, partnerships, corporations, State governments, and foreign governments.

(c) *Designating confidential commercial information.* Since January 1, 1988, submitters have been required to designate confidential commercial information as such when it is submitted to GSA or at a reasonable time thereafter. For information submitted in connection with negotiated procurements, the requirements of Federal Acquisition Regulation 48 CFR 15.407(c)(8) and 52.215-12 also apply.

(d) *Procedural requirements—consultation with the submitter.*(1) If GSA receives a FOIA request for potentially confidential commercial information, it will notify the submitter immediately by telephone and invite an opinion whether disclosure will or will

not cause substantial competitive harm.

(2) GSA will follow up the telephonic notice promptly in writing before releasing any records unless paragraph (f) of this section applies.

(3) If the submitter indicates an objection to disclosure GSA will give the submitter seven workdays from receipt of the letter to provide GSA with a detailed written explanation of how disclosure of any specified portion of the records would be competitively harmful.

(4) If the submitter verbally states that there is no objection to disclosure, GSA will confirm this fact in writing before disclosing any records.

(5) At the same time GSA notifies the submitter, it will also advise the requester that there will be a delay in responding to the request due to the need to consult with the submitter.

(6) GSA will review the reasons for nondisclosure before independently deciding whether the information must be released or should be withheld. If GSA decides to release the requested information, it will provide the submitter with a written statement explaining why his or her objections are not sustained. The letter to the submitter will contain a copy of the material to be disclosed or will offer the submitter an opportunity to review the material in none of GSA's offices. If GSA decides not to release the material, it will notify the submitter orally or in writing.

(7) If GSA determines to disclose information over a submitter's objections, it will inform the submitter the GSA will delay disclosure for 5 workdays from the estimated date the submitter receives GSA's decision before it releases the information. The decision letter to the requester shall state that GSA will delay disclosure of material it has determined to disclose to allow for the notification of the submitter.

(e) *When notice is required.* (1) For confidential commercial information submitted prior to January 1, 1988, GSA will notify a submitter whenever it receives a FOIA request for such information:

(i) If the records are less than 10 years old and the information has been

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designated by the submitter as confidential commercial information; or

(ii) If GSA has reason to believe that disclosure of the information could reasonably be expected to cause substantial competitive harm.

(2) For confidential commercial information submitted on or after January 1, 1988, GSA will notify a submitter whenever it determines that the agency may be required to disclose records:

(i) That the submitter has previously designated as privileged or confidential; or

(ii) That GSA believes could reasonably be expected to cause substantial competitive harm if disclosed.

(3) GSA will provide notice to a submitter for a period of up to 10 years after the date of submission.

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

(1) GSA 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 the FOIA;

(4) Disclosure is required by an agency rule that

(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 FOIA; and

(iii) Provides in exceptional circumstances for notice when the submitter provides written justification, at the time the information is submitted for a reasonable time thereafter, that disclosure of the information could reasonably be expected to cause substantial competitive harm;

(5) The information is not designated by the submitter as exempt from disclosure under paragraph (c) of this section, unless GSA has substantial reason to believe that disclosure of the information would be competitively harmful; or

(6) The designation made by the submitter in accordance with paragraph (c) of this section appears obviously frivolous; except that, in such cases, the agency must provide the submitter with written notice of any final admin-

istrative decision five workdays prior to disclosing the information.

(g) *Lawsuits.* If a FOIA requester sues the agency to compel disclosure of confidential commercial information, GSA will notify the submitter as soon as possible. If the submitter sues GSA to enjoin disclosure of the records, GSA will notify the requester.

Subpart 105-60.5—Exemptions

§ 105-60.501 Categories of records exempt from disclosure under the FOIA.

(a) 5 U.S.C. 552(b) provides that the requirements of the FOIA do not apply to matters that are:

(1) Specifically authorized under the criteria established by an executive order to be kept secret in the interest of national defense or foreign policy and are in fact properly classified pursuant to such executive order;

(2) Related solely to the internal personnel rules and practices of an agency;

(3) Specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute

(i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or

(ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) Trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) Interagency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) Personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) Records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information

(i) could reasonably be expected to interfere with enforcement proceedings;

(ii) would deprive a person of a right to a fair trial or an impartial adjudication;

(iii) Could reasonably be expected to constitute an unwarranted invasion of personal privacy;

(iv) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source;

(v) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law; or

(vi) could reasonably be expected to endanger the life or physical safety of any individual;

(8) Contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) Geological and geophysical information and data, including maps, concerning wells.

(b) GSA will provide any reasonably segregable portion of a record to a requester after deletion of the portions that are exempt under this section. If GSA must delete information from a record before disclosing it, this information, and the reasons for withholding it, will be clearly described in the cover letter to the requester or in an attachment. Unless indicating the extent of the deletion would harm an interest protected by an exemption, the amount of deleted information shall be indicated on the released portion of paper records by use of brackets or darkened areas indicating removal of information. In the case of electronic deletion, the amount of redacted information shall be indicated at the place in the record where such deletion

was made, unless including the indication would harm an interest protected by the exemption under which the exemption was made.

(c) GSA will invoke no exemption under this section to deny access to records that would be available pursuant to a request made under the Privacy Act of 1974 (5 U.S.C. 552a) and implementing regulations, 41 CFR part 105-64, or if disclosure would cause no demonstrable harm to any governmental or private interest.

(d) Pursuant to National Defense Authorization Act of Fiscal Year 1997, Pub. L. No. 104-201, section 821, 110 Stat. 2422, GSA will invoke Exemption 3 to deny access to any proposal submitted by a vendor in response to the requirements of a solicitation for a competitive proposal unless the proposal is set forth or incorporated by reference in a contract entered into between the agency and the contractor that submitted the proposal.

(e) Whenever a request is made which involves access to records described in § 105-60.501(a)(7)(i) and the investigation or proceeding involves a possible violation of criminal law, and there is reason to believe that the subject of the investigation or proceeding is not aware of it, and disclosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings, the agency may, during only such time as that circumstance continues, treat the records as not subject to the requirements of this section.

(f) Whenever informant records maintained by a criminal law enforcement agency under an informant's name or personal identifier are requested by a third party according to the informant's name or personal identifier, the agency may treat the records as not subject to the requirements of this section unless the informant's status as an informant has been officially confirmed.

(g) Whenever a request is made that involves access to records maintained by the Federal Bureau of Investigation pertaining to foreign intelligence or counterintelligence, or international terrorism, and the existence of the

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records is classified information as provided in paragraph (a)(1) of this section, the Bureau may, as long as the existence of the records remains classified information, treat the records are not subject to the requirements of this section.

Subpart 105–60.6—Production or Disclosure by Present or Former General Services Administration Employees in Response to Subpoenas or Similar Demands in Judicial or Administrative Proceedings

§ 105–60.601 Purpose and scope of subpart.

(a) By virtue of the authority vested in the Administrator of General Services by 5 U.S.C. 301 and 40 U.S.C. 486(c) this subpart establishes instructions and procedures to be followed by current and former employees of the General Services Administration in response to subpoenas or similar demands issued in judicial or administrative proceedings for production or disclosure of material or information obtained as part of the performance of a person's official duties or because of the person's official status. Nothing in these instructions applies to responses to subpoenas or demands issued by the Congress or in Federal grand jury proceedings.

(b) This subpart provides instructions regarding the internal operations of GSA and the conduct of its employees, and is not intended and does not, and may not, be relied upon to create any right or benefit, substantive or procedural, enforceable at law by a party against GSA.

§ 105–60.602 Definitions.

For purposes of this subpart, the following definitions apply:

(a) *Material* means any document, record, file or data, regardless of the physical form or the media by or through which it is maintained or recorded, which was generated or acquired by a current or former GSA employee by reason of the performance of that person's official duties or because of the person's official status, or any other tangible item, e.g., personal

property possessed or controlled by GSA.

(b) *Information* means any knowledge or facts contained in material, and any knowledge or facts acquired by current or former GSA employee as part of the performance of that person's official duties or because of that person's official status.

(c) *Demand* means any subpoena, order, or similar demand for the production or disclosure of material, information or testimony regarding such material or information, issued by a court or other authority in a judicial or administrative proceeding, excluding congressional subpoenas or demands in Federal grand jury proceedings, and served upon a present or former GSA employee.

(d) *Appropriate Authority* means the following officials who are delegated authority to approve or deny responses to demands for material, information or testimony:

(1) The Counsel to the Inspector General for material and information which is the responsibility of the GSA Office of Inspector General or testimony of current or former employees of the Office of the Inspector General;

(2) The Counsel to the GSA Board of Contract Appeals for material and information which is the responsibility of the Board of Contract Appeals or testimony of current or former Board of Contract Appeals employees;

(3) The GSA General Counsel, Associate General Counsel(s) or Regional Counsel for all material, information, or testimony not covered by paragraphs (d)(1) and (2) of this section.

§ 105–60.603 Acceptance of service of a subpoena duces tecum or other legal demand on behalf of the General Services Administration.

(a) The Administrator of General Services and the following officials are the only GSA personnel authorized to accept service of a subpoena or other legal demand on behalf of GSA: The GSA General Counsel and Associate General Counsel(s) and, with respect to material or information which is the responsibility of a regional office, the Regional Administrator and Regional Counsel. The Inspector General and Counsel to the Inspector General, as

well as the Chairman and Vice Chairman of the Board of Contract Appeals, are authorized to accept service for material or information which are the responsibility of their respective organizations.

(b) A present or former GSA employee not authorized to accept service of a subpoena or other demand for material, information or testimony obtained in an official capacity shall respectfully inform the process server that he or she is not authorized to accept service on behalf of GSA and refer the process server to an appropriate official listed in paragraph (a) of this section.

(c) A Regional Administrator or Regional Counsel shall notify the General Counsel of a demand which may raise policy concerns or affect multiple regions.

§ 105-60.604 Production or disclosure prohibited unless approved by the Appropriate Authority.

No current or former GSA employee shall, in response to a demand, produce any material or disclose, through testimony or other means, any information covered by this subpart, without prior approval of the Appropriate Authority.

§ 105-60.605 Procedure in the event of a demand for production or disclosure.

(a) Whenever service of a demand is attempted in person or via mail upon a current or former GSA employee for the production of material or the disclosure of information covered by this subpart, the employee or former employee shall immediately notify the Appropriate Authority through his or her supervisor or his or her former service, staff office, or regional office. The supervisor shall notify the Appropriate Authority. For current or former employees of the Office of Inspector General located in regional offices, Counsel to the Inspector General shall be notified through the immediate supervisor or former employing field office.

(b) The Appropriate Authority shall require that the party seeking material or testimony provide the Appropriate Authority with an affidavit, declaration, statement, and/or a plan as de-

scribed in paragraphs (c) (1), (2), and (3) of this section if not included with or described in the demand. The Appropriate Authority may waive this requirement for a demand arising out of proceedings to which GSA or the United States is a party. Any waiver will be coordinated with the United States Department of Justice (DOJ) in proceedings in which GSA, its current or former employees, or the United States are represented by DOJ.

(c)(1) Oral testimony. If oral testimony is sought by a demand, the Appropriate Authority shall require the party seeking the testimony or the party's attorney to provide, by affidavit or other statement, a detailed summary of the testimony sought and its relevance to the proceedings. Any authorization for the testimony of a current or former GSA employee shall be limited to the scope of the demand as summarized in such statement or affidavit.

(2) Production of material. When information other than oral testimony is sought by a demand, the Appropriate Authority shall require the party seeking production or the party's attorney to provide a detailed summary, by affidavit or other statement, of the information sought and its relevance to the proceeding.

(3) The Appropriate Authority may require a plan or other information from the party seeking testimony or production of material of all demands reasonably foreseeable, including, but not limited to, names of all current and former GSA employees from whom testimony or production is or will likely be sought, areas of inquiry, for current employees the length of time away from duty anticipated, and identification of documents to be used in each deposition or other testimony, where appropriate.

(d) The Appropriate Authority will notify the current or former employee, the appropriate supervisor, and such other persons as circumstances may warrant, whether disclosure or production is authorized, and of any conditions or limitations to disclosure or production.

(e) Factors to be considered by the Appropriate Authority in responding to demands:

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(1) Whether disclosure or production is appropriate under rules of procedure governing the proceeding out of which the demand arose;

(2) The relevance of the testimony or documents to the proceedings;

(3) The impact of the relevant substantive law concerning applicable privileges recognized by statute, common law, judicial interpretation or similar authority;

(4) The information provided by the issuer of the demand in response to requests by the Appropriate Authority pursuant to paragraphs (b) and (c) of this section;

(5) The steps taken by the issuer of the demand to minimize the burden of disclosure or production on GSA, including but not limited to willingness to accept authenticated copies of material in lieu of personal appearance by GSA employees;

(6) The impact on pending or potential litigation involving GSA or the United States as a party;

(7) In consultation with the head of the GSA organizational component affected, the burden on GSA which disclosure or production would entail; and

(8) Any additional factors unique to a particular demand or proceeding.

(f) The Appropriate Authority shall not approve a disclosure or production which would:

(1) Violate a statute or a specific regulation;

(2) Reveal classified information, unless appropriately declassified by the originating agency;

(3) Reveal a confidential source or informant, unless the investigative agency and the source or informant consent;

(4) Reveal records or information compiled for law enforcement purposes which would interfere with enforcement proceedings or disclose investigative techniques and procedures the effectiveness of which would be impaired;

(5) Reveal trade secrets or commercial or financial information which is privileged or confidential without prior consultation with the person from whom it was obtained; or

(6) Be contrary to a recognized privilege.

(g) The Appropriate Authority's determination, including any reasons for

denial or limitations on disclosure or production, shall be made as expeditiously as possible and shall be communicated in writing to the issuer of the demand and appropriate current or former GSA employee(s). In proceedings in which GSA, its current or former employees, or the United States are represented by DOJ, the determination shall be coordinated with DOJ which may respond to the issuer of the subpoenas or demand in lieu of the Appropriate Authority.

§ 105-60.606 Procedure where response to demand is required prior to receiving instructions.

(a) If a response to a demand is required before the Appropriate Authority's decision is issued, a GSA attorney designated by the Appropriate Authority for the purpose shall appear with the employee or former employee upon whom the demand has been made, and shall furnish the judicial or other authority with a copy of the instructions contained in this subpart. The attorney shall inform the court or other authority that the demand has been or is being referred for the prompt consideration by the Appropriate Authority. The attorney shall respectfully request the judicial or administrative authority to stay the demand pending receipt of the requested instructions.

(b) The designated GSA attorney shall coordinate GSA's response with DOJ's Civil Division or the relevant Office of the United States Attorney and may request that a DOJ or Assistant United States Attorney appear with the employee in addition to or in lieu of a designated GSA attorney.

(c) If an immediate demand for production or disclosure is made in circumstances which preclude the appearance of a GSA or DOJ attorney on the behalf of the employee or the former employee, the employee or former employee shall respectfully make a request to the demanding authority for sufficient time to obtain advice of counsel.

§ 105-60.607 Procedure in the event of an adverse ruling.

If the court or other authority declines to stay the effect of the demand

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in response to a request made in accordance with §105-60.606 pending receipt of instructions, or if the court or other authority rules that the demand must be complied with irrespective of instructions by the Appropriate Authority not to produce the material or disclose the information sought, the employee or former employee upon whom the demand has been made shall respectfully decline to comply, citing these instructions and the decision of the United States Supreme Court in United States ex rel. *Touhy v. Ragen*, 340 U.S. 462 (1951).

§ 105-60.608 Fees, expenses, and costs.

(a) In consultation with the Appropriate Authority, a current employee who appears as a witness pursuant to a demand shall ensure that he or she receives all fees and expenses, including travel expenses, to which witnesses are entitled pursuant to rules applicable to the judicial or administrative proceedings out of which the demand arose.

(b) Witness fees and reimbursement for expenses received by a GSA employee shall be disposed of in accordance with rules applicable to Federal employees in effect at the time.

(c) Reimbursement to the GSA for costs associated with producing material pursuant to a demand shall be determined in accordance with rules applicable to the proceedings out of which the demand arose.

PART 105-62—DOCUMENT SECURITY AND DECLASSIFICATION

Sec.

105-62.000 Scope of part.

Subpart 105.62.1—Classified Materials

- 105-62.101 Security classification categories.
- 105-62.102 Authority to originally classify.
- 105-62.103 Access to GSA-originated materials.

Subpart 105-62.2—Declassification and Downgrading

- 105-62.201 Declassification and downgrading.
- 105-62.202 Review of classified materials for declassification purposes.

AUTHORITY: Sec. 205(c), 63 Stat. 390; 40 U.S.C. 486(c); and E.O. 12065 dated June 28, 1978.

41 CFR Ch. 105 (7-1-01 Edition)

SOURCE: 44 FR 64805, Nov. 8, 1979, unless otherwise noted.

§ 105-62.000 Scope of part.

This part prescribes procedures for safeguarding national security information and material within GSA. They explain how to identify, classify, downgrade, declassify, disseminate, and protect such information in the interests of national security. They also supplement and conform with Executive Order 12065 dated June 28, 1978, subject: National Security Information, and the Implementing Directive dated September 29, 1978, issued through the Information Security Oversight Office.

Subpart 105-62.1—Classified Materials

§ 105-62.101 Security classification categories.

As set forth in Executive Order 12065, official information or material which requires protection against unauthorized disclosure in the interests of the national defense or foreign relations of the United States (hereinafter collectively termed “national security”) shall be classified in one of three categories: Namely, Top Secret, Secret, or Confidential, depending on its degree of significance to the national security. No other categories shall be used to identify official information or material as requiring protection in the interests of national security except as otherwise expressly provided by statute. The three classification categories are defined as follows:

(a) *Top Secret.* Top Secret refers to that national security information which requires the highest degree of protection, and shall be applied only to such information as the unauthorized disclosure of which could reasonably be expected to cause exceptionally grave damage to the national security. Examples of exceptionally grave damage include armed hostilities against the United States or its allies, disruption of foreign relations vitally affecting the national security, intelligence sources and methods, and the compromise of vital national defense plans or complex cryptologic and communications systems. This classification

shall be used with the utmost restraint.

(b) *Secret*. Secret refers to that national security information or material which requires a substantial degree of protection, and shall be applied only to such information as the unauthorized disclosure of which could reasonably be expected to cause serious damage to the national security. Examples of serious damage include disruption of foreign relations significantly affecting the national security, significant impairment of a program or policy directly related to the national security, and revelation of significant military plans or intelligence operations. This classification shall be used sparingly.

(c) *Confidential*. Confidential refers to other national security information which requires protection, and shall be applied only to such information as the unauthorized disclosure of which could reasonably be expected to cause identifiable damage to the national security.

§ 105-62.102 Authority to originally classify.

(a) *Top secret, secret, and confidential*. The authority to originally classify information as Top Secret, Secret, or Confidential may be exercised only by the Administrator and is delegable only to the Director, Information Security Oversight Office.

(b) *Limitations on delegation of classification authority*. Delegations of original classification authority are limited to the minimum number absolutely required for efficient administration. Delegated original classification authority may not be redelegated.

[47 FR 5416, Feb. 5, 1982]

§ 105-62.103 Access to GSA-originated materials.

Classified information shall not be disseminated outside the executive branch of the Government without the express permission of the GSA Security Officer except as otherwise provided in this § 105-62.103.

(a) *Access by historical researchers*. Persons outside the executive branch who are engaged in historical research projects, may be authorized access to classified information or material, provided that:

(1) A written determination is made by the Administrator of General Services that such access is clearly consistent with the interests of national security.

(2) Access is limited to that information over which GSA has classification jurisdiction.

(3) The material requested is reasonably accessible and can be located with a reasonable amount of effort.

(4) The person agrees to safeguard the information and to authorize a review of his or her notes and manuscript for determination that no classified information is contained therein by signing a statement entitled "Conditions Governing Access to Official Records for Historical Research Purposes."

(5) An authorization for access shall be valid for a period of 2 years from the date of issuance and may be renewed under the provisions of this § 105-62.103(a).

(b) *Access by former Presidential appointees*. Persons who previously occupied policymaking positions to which they were appointed by the President may not remove classified information or material upon departure from office as all such material must remain under the security control of the U.S. Government. Such persons may be authorized access to classified information or material which they originated, received, reviewed, signed, or which was addressed to them while in public office, provided that the GSA element having classification jurisdiction for such information or material makes a written determination that access is consistent with the interests of national security, approval is granted by the GSA Security Officer, and the individual seeking access agrees:

(1) To safeguard the information,

(2) To authorize a review of his or her notes for determination that no classified information is contained therein, and

(3) To ensure that no classified information will be further disseminated or published.

(c) *Access during judicial proceedings*. Classified information will not normally be released in the course of any civilian judicial proceeding. In special circumstances however, and upon the receipt of an order or subpoena issued

by a Federal court, the Administrator may authorize the limited release of classified information if he or she determines that the interests of justice cannot otherwise be served. Appropriate safeguards will be established to protect such classified material released for use in judicial proceedings.

(d) *Access to material in NARS custody.* The Archivist of the United States prepares procedures governing access to materials transferred to NARS custody. These procedures are issued by the Administrator of General Services in 41 CFR part 105-61.

(e) *Access by the General Accounting Office and congressional committees.* Classified information may be released to the General Accounting Office (GAO) and congressional committees when specifically authorized by the GSA Security Officer except as otherwise provided by law.

Subpart 105-62.2—Declassification and Downgrading

§ 105-62.201 **Declassification and downgrading.**

(a) *Authority to downgrade and declassify.* The authority to downgrade and declassify national security information or material shall be exercised as follows:

(1) Information or material may be downgraded or declassified by the GSA official authorizing the original classification, by a successor in capacity, by a supervisory official of either, or by the Information Security Oversight Committee on appeal.

(2) Downgrading and declassification authority may also be exercised by an official specifically authorized by the Administrator.

(3) In the case of classified information or material officially transferred to GSA by or under statute or Executive order in conjunction with a transfer of functions and not merely for storage purposes, GSA shall be deemed the originating agency for all purposes under these procedures including downgrading and declassification.

(4) In the case of classified information or material held in GSA not officially transferred under paragraph (a)(3) of this section but originated in an agency which has since ceased to

exist, GSA is deemed the originating agency. Such information or material may be downgraded and declassified 30 calendar days after consulting with any other agencies having an interest in the subject matter.

(5) Classified information or material under the final declassification jurisdiction of GSA which has been transferred to NARS for accession into the Archives of the United States may be downgraded and declassified by the Archivist of the United States in accordance with Executive Order 12065, directives of the Information Security Oversight Office, and the systematic review guidelines issued by the Administrator of General Services.

(6) It is presumed that information which continues to meet classification requirements requires continued protection. In some cases, however, the need to protect such information may be outweighed by the public interest in disclosure of the information, and in these cases the information should be declassified. When such questions arise they shall be referred to the Administrator, the Director of the Information Security Oversight Office, or in accordance with the procedures for mandatory review described in § 105-62.202(b).

(b) *Declassification.* Declassification of information shall be given emphasis comparable to that accorded classification. Information classified under Executive Order 12065 and prior orders shall be declassified as early as national security considerations permit. Decisions concerning declassification shall be based on the loss of sensitivity of the information with the passage of time or on the occurrence of an event which permits declassification. When information is reviewed for declassification it shall be declassified unless the declassification authority established in § 105-62.202 determines that the information continues to meet the classification requirements prescribed despite the passage of time.

(c) *Downgrading.* Classified information that is marked for automatic downgrading is downgraded accordingly without notification to holders. Classified information that is not marked for automatic downgrading may be assigned a lower classification designation by the originator or by an

official authorized to declassify the same information. Notice of downgrading shall be provided to known holders of the information.

§ 105-62.202 Review of classified materials for declassification purposes.

(a) *Systematic review for declassification.* Except for foreign government information, classified information constituting permanently valuable records of GSA as defined by 44 U.S.C. 2103, and information in the possession and under control of NARA, under 44 U.S.C. 2107 or 2107 note, shall be reviewed for declassification as it becomes 20 years old. Transition to systematic review at 20 years shall be implemented as rapidly as practicable and shall be completed by December 1, 1988. Foreign government information shall be reviewed for declassification as it becomes 30 years old.

(b) *Mandatory review for declassification.* All classified information upon request by a member of the public or a Government employee or agency to declassify and release such information under the provisions of Executive Order 12065 shall be reviewed by the responsible GSA element for possible declassification in accordance with the procedures set forth in paragraphs (c) through (g) of this section.

(c) *Submission of requests for review.* Requests for mandatory review of classified information shall be submitted in accordance with the following:

(1) Requests originating within GSA shall in all cases be submitted directly to the service or staff office that originated the information.

(2) For expeditious action, requests from other governmental agencies or from members of the public should be submitted directly to the service or staff office that originated the material, or, if the originating element is not known, or no longer exists, the requester shall submit the request to the GSA Security Officer who shall cause such request to be reviewed.

(d) *Requirements for processing.* Requests for declassification review and release of information shall be processed in accordance with the provisions set forth in paragraphs (e) through (h) of this section subject to the following conditions:

(1) The request is in writing and reasonably describes the information sought with sufficient particularity to enable the element to identify it.

(2) The requester shall be asked to correct a request that does not comply with paragraph (d)(1) of this section, to provide additional information.

(3) If within 30 days the requester does not correct the request, describe the information sought with sufficient particularity or narrow the scope of the request, the element that received the request shall notify the requester and state the reason why no action will be taken on the request.

(e) *Processing of requests.* Requests that meet the foregoing requirements for processing will be acted upon as follows:

(1) GSA action upon the initial request shall be completed within 60 days.

(2) Receipt of the request shall be acknowledged within 7 days.

(3) The designated service or staff office shall determine if the requested information may be declassified and shall make such information available to the requester, unless withholding it is otherwise warranted under applicable law. If the information may not be released in whole or in part, the requester shall be given a brief statement as to the reasons for denial, a notice of the right to appeal the determination to the Deputy Administrator (the notice shall include the Deputy Administrator's name, title, and address), and a notice that such an appeal must be filed with the Deputy Administrator within 60 days in order to be considered.

(f) *Foreign government information.* Except as provided hereinafter, requests for mandatory review for the declassification of classified documents that contain foreign government information shall be processed and acted upon in accordance with the provisions of paragraphs (c) through (e) of this section. If the request involves information that was initially received or classified by GSA, then the corresponding service or staff office shall be designated by the GSA Security Officer to determine whether the foreign government information in the document

may be declassified and released in accordance with GSA policy or guidelines, after consulting with other agencies that have subject matter interest as necessary. If GSA is not the agency that received or classified the foreign government information, it shall refer the request to the appropriate agency. In those cases where agency policy or guidelines do not apply, consultation with the foreign originator, through the GSA Security Officer, may be made prior to final action on the request.

(g) *Information classified outside the service or staff office.* When a service or staff office receives a request for declassification of information in a document which is in the custody of the service or staff office but was classified by another service or staff office or by another Government agency, the service or staff office shall refer the request to the classifying service or staff office or Government agency, together with a copy of the document containing the information requested when practicable, and shall notify the requester of the referral, unless the agency that classified the information objects on the grounds that its association with the information requires protection. When a GSA service or staff office receives such a referral, it shall process the request in accordance with the requirements of this paragraph and, if so requested, shall notify the referring service, staff office, or agency of the determination made on the request.

(h) *Action on appeal.* The following procedures shall be followed when denials of requests for declassification are appealed:

(1) The Deputy Administrator shall, within 15 days of the date of the appeal, convene a meeting of the GSA Information Security Oversight Committee (ISOC) that shall include the GSA Security Officer, or his or her representative, and the GSA official who denied the original request (and, at the option of that official, any subordinates or personnel from other agencies that participated in the decision for denial).

(2) The ISOC shall learn from the official the reasons for denying the re-

quest, concentrating in particular upon which requirement continued classification is based and the identifiable damage that would result if the information were declassified. The ISOC shall also learn from the official the part or parts of the information that is classified and if by deleting minor segments of the information it might not then be declassified.

(3) The ISOC's decision to uphold or deny the appeal, in whole or in part, shall be based upon the unanimous opinion of its membership. In the event that unanimity cannot be attained, the matter shall be referred to the Administrator, whose decision shall be final.

(4) Based upon the outcome of the appeal, a reply shall be made to the person making the appeal that either encloses the requested information or part of the information, or explains why the continued classification of the information is required. A copy of the reply shall be sent to the GSA official who originally denied the request for declassification, to the GSA Security Officer, and to any other agency expressing an interest in the decision.

(5) Final action on appeals shall be completed within 30 days of the date of the appeal.

(i) *Prohibition.* No service or staff office in possession of a classified document may refuse to confirm the existence of the document in response to a request for the document under the provisions for mandatory review, unless the fact of its existence would itself be classifiable.

(j) *Presidential papers.* Information less than 10 years old which was originated by the President, by the White House staff, or by committees or commissions appointed by the President, or by others acting on behalf of the President, is exempted from mandatory review for declassification. Such information 10 years old or older is subject to mandatory review for declassification in accordance with procedures developed by the Archivist of the United States which provide for consultation with GSA on matters of primary subject interest to this agency.

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PART 105-64—REGULATIONS IMPLEMENTING THE PRIVACY ACT OF 1974

Sec.

- 105-64.000 Scope of part.
- 105-64.001 Purpose.
- 105-64.002 Definitions.

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- 105-64.101 Maintenance of records.
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 - 105-64.101-2 Standards of accuracy.
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 - 105-64.101-4 Safeguarding systems of records.
 - 105-64.101-5 Inconsistent directives of GSA superseded.
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- 105-64.201 Conditions of disclosure.
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Subpart 105-64.4—Requests to Amend Records

- 105-64.401 Submission of requests to amend records.
- 105-64.402 Review of requests to amend records.
- 105-64.403 Approval of requests to amend.
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Subpart 105-64.5—Reporting New Systems and Altering Existing Systems

- 105-64.501 Reporting requirement.
- 105-64.502 FEDERAL REGISTER notice of establishment of new system or alteration of existing system.
- 105-64.503 Effective date of new systems of records or alteration of an existing system of records.

Subpart 105-64.6—Exemptions

- 105-64.601 General exemptions.
- 105-64.602 Specific exemptions.

Subpart 105-64.7—Assistance and Referrals

- 105-64.701 Requests for assistance and referral.

AUTHORITY: Sec. 205(c), 63 Stat. 390 (40 U.S.C. 486(c)); 88 Stat. 1897 (5 U.S.C. 552a).

SOURCE: 50 FR 43139, Oct. 24, 1985, unless otherwise noted.

§ 105-64.000 Scope of part.

The policies and procedures for collecting, using, and disseminating records maintained by GSA are subject to 5 U.S.C. 552a, and defined in §105-64.002. Policies and procedures governing availability of records in general are in parts 105-60 and 61 of this chapter. This part also covers exemptions from disclosing personal information; procedures guiding persons who wish to obtain information, or to inspect or correct the content of records; accounting for disclosure of information; requirements for medical records; and fees.

§ 105-64.001 Purpose.

This part implements 5 U.S.C. 552a (Pub. L. 93-579), known as the Privacy Act of 1974 (referred to as the Act). This part states procedures for notifying an individual of a GSA system of records containing a record pertaining to him or her, procedures for gaining access to or contesting the content of records, and other procedures for carrying out the Act.

§ 105-64.002 Definitions.

For the purpose of this part 105-64, the terms listed below are defined as follows:

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(a) *Agency* means agency as defined in 5 U.S.C. 552(e);

(b) *Individual* means a citizen of the United States or a legal alien admitted for permanent residence;

(c) *Maintain* means keep, collect, use, and disseminate;

(d) *A record* means any item, collection, or grouping of information an agency maintains about a person, including, but not limited to, his or her educational background, financial transactions, medical history, and employment or criminal history, and that contains his or her name or other identifying number of symbols such as a fingerprint, voiceprint, or photograph;

(e) *A system of records* means any group of records under the control of the agency from which information is retrieved by a person's name or by an identifying number, symbols, or other identifiers assigned to that individual;

(f) *A statistical record* means an item of information maintained for statistical research or reporting purposes that is not used in making any determination about an identifiable person, except as provided by Section 8 of Title 13 U.S.C.;

(g) *Routine use* means using a record for the purpose for which it was intended;

(h) *System manager* means the GSA employee who maintains a system of records and who collects, uses, and disseminates the information in it;

(i) *The subject individual* means the person named or discussed in a record or the person to whom a record refers;

(j) *Disclosure* means transferring a record, a copy of a record, or the information contained in a record to someone other than the subject individual, or the reviewing of a record by someone other than the subject individual;

(k) *Access* means a transfer of a record, a copy of a record, or the information in a record to the subject individual, or the review of a record by the subject individual; and

(l) *Solicitation* means a request by an officer or employee of GSA for a person to provide information about himself or herself.

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Subpart 105-64.1—General Policy

§ 105-64.101 Maintenance of records.

§ 105-64.101-1 Collection and use.

(a) *General.* The system manager (also called the manager) should collect information used for determining an individual's rights, benefits, or privileges under GSA programs directly from the subject individual if practical. The system manager should ensure that information collected is used only as intended by the Act and these regulations.

(b) *Soliciting information.* Manager must ensure that when information is solicited, the person is informed of the authority for collecting it; whether providing it is mandatory or voluntary; the purpose for which it will be used; routine uses of the information; and the effect on the individual, if any, of not providing the information. Heads of Services and Staff Offices and Regional Administrators must ensure that forms used to solicit information comply with the Act and these regulations.

(c) *Soliciting a social security number.* Before requesting a person to disclose his or her social security number, ensure either:

(1) The disclosure is required by Federal statute, or;

(2) Disclosure is required under a statute or regulation adopted before January 1, 1975, to verify the person's identity, and that it was part of a system of records in existence before January 1, 1975.

If soliciting a social security number is authorized under paragraph (c) (1) or (2) of this section, inform the person beforehand whether the disclosure is mandatory or voluntary, by what legal or other authority the number is requested, and the use that is to be made of it.

(d) *Soliciting information from third parties.* Officers or employees must inform third parties requested to provide information about another person of the reason for collecting the information.

§ 105-64.101-2 Standards of accuracy.

Managers should ensure that the records used by the Agency to make

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determinations about an individual are maintained with the accuracy, relevance, timeliness, and completeness needed to ensure fairness to the individual.

§ 105–64.101–3 Rules of conduct.

Those who design, develop, operate, or maintain a system of records, or any record, must review 5 U.S.C. 552a and the regulations in this part and follow 41 CFR part 105–735, Standards of Conduct, for protecting personal information.

§ 105–64.101–4 Safeguarding systems of records.

Managers must ensure that administrative, technical, and physical safeguards are established to ensure the security and confidentiality of records and to protect against possible threats or hazards which could be harmful, embarrassing, inconvenient, or unfair to any individual. They must protect personnel information contained in manual and automated systems of records by using the following safeguards:

(a) Storing official personnel folders and work folders in a lockable filing cabinet when not in use. The system manager may use an alternative storage system if it provides the same security as a locked cabinet.

(b) Designating other sensitive records that need safeguards similar to those described in paragraph (a) of this section.

(c) Permitting access to and use of automated or manual personnel records only to persons whose official duties require it, or to a subject individual or to his or her representative.

§ 105–64.101–5 Inconsistent directives of GSA superseded.

This part 105–64 applies or takes precedence when any GSA directive disagrees with it.

§ 105–64.102 Records of other agencies.

If a GSA employee receives a request to review records that are the primary responsibility of another agency, but are maintained by or in the temporary possession of GSA, the employee should consult with the other agency before releasing the records. Records in the custody of GSA that are the re-

sponsibility of the Office of Personnel Management (OPM) are governed by rules issued by OPM under the Privacy Act.

§ 105–64.103 Subpoenas and other legal demands.

Access to systems of records by subpoena or other legal process must meet the provisions of ubpart 105–60.6 of this chapter.

Subpart 105–64.2—Disclosure of Records

§ 105–64.201 Conditions of disclosure.

GSA employees may not disclose any record to a person or another agency without the express written consent of the subject individual unless the disclosure is:

(a) To GSA officials or employees who need the information to perform their official duties;

(b) Required by the Freedom of Information Act;

(c) For a routine use identified in the FEDERAL REGISTER;

(d) For Bureau of the Census use under Title 13 of the United States Code;

(e) To someone who has assured GSA in writing that the record is to be used solely for statistical research or reporting, and if it does not identify an individual;

(f) To the National Archives of the United States as a record that has historical or other value warranting permanent retention;

(g) To another agency or instrumentality under the jurisdiction or control of the United States for a civil or criminal law enforcement activity, if the head of the agency or instrumentality or the designated representative has made a written request to GSA specifying the part needed and the law enforcement agency seeking it;

(h) To a person showing compelling circumstances affecting someone's health and safety not necessarily the subject individual (Upon disclosure, a notification must be sent to the subject individual's last known address);

(i) To either House of Congress or to a committee or subcommittee (joint or of either House), to the extent that the matter falls within its jurisdiction;

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(j) To the Comptroller General or an authorized representative while performing the duties of the General Accounting Office;

(k) Under an order of a court of competent jurisdiction; or

(l) To a consumer reporting agency under section 3(d) of the Federal Claims Collection Act of 1966 (31 U.S.C. 3711(f)(1)).

§ 105-64.202 Procedures for disclosure.

(a) On receiving a request to disclose a record, the manager should verify the requester's right to obtain the information under § 105-64.201. Upon verification, the manager may make the records available.

(b) If the manager decides the record can't be disclosed, he or she must inform the requester in writing and state that the denial can be appealed to the GSA Privacy Act Officer, General Services Administration (ATRAI), for a final decision.

§ 105-64.203 Accounting of disclosure.

(a) Except for disclosures made under § 105-64.201 (a) and (b), an accurate account of each disclosure is kept and retained for 5 years or for the life of the record, whichever is longer. The date, reason, and type of information disclosed, as well as the name and address of the person or agency to whom you disclosed it are noted.

(b) The manager also keeps with the account of information disclosed:

(1) A statement justifying the disclosure;

(2) Any documentation related to disclosing a record for statistical or law enforcement use; and

(3) The written consent of the person concerned.

(c) Except when records are disclosed to agencies or instrumentalities for law enforcement under § 105-64.201(g) or from exempt systems (see subpart 105-64.6), accounts of information disclosed must be opened to the person concerned, upon request. Procedures to request such access are given in the following subpart.

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Subpart 105-64.3—Individual Access to Records

§ 105-64.301 Access procedures.

§ 105-64.301-1 Form of requests.

(a) A person who wants to see a record or any information concerning him or her that is contained in a system or records maintained in the GSA Central Office should send a written request to the GSA Privacy Act Officer, General Services Administration (ATRAI), Washington, DC 20405. For records maintained in GSA regional offices, send the request to the Director, Administrative Services Division at the address shown in § 105-64.301-6.

(b) Requests must be made in writing and must be labeled Privacy Act Request both on the letter and on the envelope. The letter should contain the full name and identifying number of the system as published in the FEDERAL REGISTER; the full name and address of the subject individual; a brief description of the nature, time, place, and circumstances of the person's association with GSA; and any other information that would indicate whether the information is in the system of records. The 10-workday time limit for the agency to reply under § 105-64.301-3, begins when a request is received in the office of the official identified in this section.

(c) Managers may accept oral requests for access, if the requester is properly identified.

§ 105-64.301-2 Special requirements for medical records.

(a) A manager who receives a request for access to official medical records belonging to the Office of Personnel Management and described in Chapter 339, Federal Personnel Manual (records about entrance qualification, fitness for duty, or records filed in the official personnel folder), should refer the matter to a Federal medical officer for a decision under this section. If no medical officer is available, the manager should send the request and the medical reports to the Office of Personnel Management for a decision.

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(b) If the Federal medical officer believes the medical records requested by the subject individual discuss a condition that a physician would hesitate to reveal to the person, the manager may release the information only to a physician designated in writing by the subject individual, his or her guardian, or conservator. If the records contain information the physician would likely disclose to the person, the information may be released to anyone the person authorizes in writing to receive it.

§ 105-64.301-3 Granting access.

(a) Upon receiving a request for access to nonexempt records, the manager must make them available to the subject individual or acknowledge the request within 10 workdays after it is received, stating when the records will be available.

(b) If the manager expects a delay of more than the 10 days allowed, he or she should state the reason why in the acknowledgement.

(c) If a request for access does not contain enough information to find the records, the manager should request additional information from the individual and is allowed 10 more workdays after receiving it to make the records available or acknowledge receiving the request.

(d) Records are available during normal business hours at the offices where the records are maintained. Requesters should be prepared to identify themselves by signature and to show other identification verifying their signature.

(e) Managers may permit an individual to examine the original of a nonexempt record and, if asked, provide the person with a copy of the record. Fees are charged only for copies given to the person, not for copies made for the agency's convenience.

(f) A requester may pick up a record in person or receive it by mail, directed to an address provided in the request. The manager should not give a record to a third party to deliver to the subject individual, except medical records as outlined in §105-64.301-2 or as described in paragraph (g) of this section.

(g) If a person wants to have someone else accompany him or her while reviewing a record or when obtaining a

copy of it, he or she must first sign a statement authorizing the disclosure of the record. The system manager shall maintain this statement with the record.

(h) The procedure to review the account of disclosures is the same as the procedures for reviewing a record.

§ 105-64.301-4 Denials of access.

(a) A manager may deny access to a record only if the information is being compiled in reasonable anticipation of a civil action or proceeding as provided under 5 U.S.C. 552(d)(5) or if rules published in the FEDERAL REGISTER state that it is in a system of records that may not be disclosed. These systems are described in Subpart 105-64.6.

(b) If a manager receives a request for access to a record in an exempt system of record, he or she should forward it to the Head of the Service or Staff Office or Regional Administrator, attaching an explanation and recommending the request be denied or granted.

(c) If the manager is the Head of a Service or Staff Office or a Regional Administrator, he or she retains the responsibility for granting or denying the request.

(d) The head of the Service or Staff Office or Regional Administrator, in consultation with legal counsel and other officials concerned, should decide whether the requested record is exempt from disclosure and,

(1) If the record is not exempt, notify the system manager to grant the request under §105-64.301-3; or

(2) If the record is part of an exempt system he or she should:

(i) Notify the requester that the request is denied, explain why it is denied, and inform the requester of his or her right to have GSA review the decision; or

(ii) Notify the manager to make the record available under §105-64.301-3, even though it is in an exempted system.

(e) A copy of any denial of a request should be sent to the GSA Privacy Act Officer (ATRAI).

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§ 105-64.301-5 Appeal of denial of access within GSA.

(a) A requester who is denied access, in whole or in part, to records pertaining to him or her may file an administrative appeal. Appeals should be addressed to the GSA Privacy Act Officer, General Services Administration (ATRAI), Washington, DC 20405, regardless whether the denial was made by a Central Office or a regional official.

(b) Each appeal to the Privacy Act Officer must be in writing. The appeal should be marked Privacy Act-Access Appeal, on the face of the letter and on the envelope.

(c) On receiving an appeal, the Privacy Act Officer consults with the manager, the official who made the denial, legal counsel, and other officials concerned. If the Privacy Act Officer, after consultation, decides to grant the request, he or she notifies the manager in writing to grant access to the record under §105-64.301-3, or grants access himself or herself and notifies the requester of that action.

(d) If the Privacy Act Officer decides the appeal should be rejected, he or she sends the request file and any appeal, with a recommendation, to the Deputy Administrator for a final administrative decision.

(e) If the Deputy Administrator decides to grant a request, he or she promptly instructs the system manager in writing to grant access to the record under §105-64.301-3. The Deputy Administrator sends a copy of the instructions to the Privacy Act Officer, who notifies the requester.

(f) If the Deputy Administrator rejects an appeal, he or she should promptly notify the requester in writing. This action constitutes the final administrative decision on the request and should state:

(1) The reason for rejecting the appeal; and

(2) That the requester has the right to have a court review the final decision under §105-64.408.

(g) The final decision must be made within 30 workdays from the date the appeal is received by the Privacy Act Officer. The Deputy Administrator may extend the time limit by notifying the requester in writing before the 30 days are up. The Deputy Administra-

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tor's letter should explain why the time was extended.

§ 105-64.301-6 Geographic composition, addresses and telephone numbers of regional Administrative Services Division directors.

Region 1

Boston (includes Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont) Telephone: 617-223-5212
Director, Administrative Services Division, General Services Administration (1BR), John W. McCormack Post Office and Courthouse, Boston, MA 02109

Region 2

New York (includes New Jersey, New York, the Commonwealth of Puerto Rico, and the Virgin Islands) Telephone: 212-264-8262
Director, Administrative Services Division, General Services Administration (2BR), 26 Federal Plaza, New York, NY 10278

Region 3

Philadelphia (includes Delaware, Maryland, Pennsylvania, Virginia, and West Virginia with the exception of the National Capital Region) Telephone: 215-597-7926
Director, Administrative Services Division, General Services Administration (3BR), Ninth and Market Streets, Philadelphia, PA 19107

Region 4

Atlanta (includes Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, and Tennessee) Telephone: 404-221-3240
Director, Administrative Services Division, General Services Administration (4BR), 75 Spring Street, SW, Atlanta, GA 30303

Region 5

Chicago (includes Illinois, Indiana, Michigan, Ohio, Minnesota, and Wisconsin) Telephone: 312-353-8421
Director, Administrative Services Division, General Services Administration (5BR), 230 South Dearborn Street, Chicago, IL 60604

Region 6

Kansas City (includes Iowa, Kansas, Missouri, and Nebraska) Telephone: 816-374-7581
Director, Administrative Services Division, General Services Administration (6BR), 1500 East Bannister Road, Kansas City, MO 64131

Region 7

Fort Worth (includes Arkansas, Louisiana, New Mexico, Texas, and Oklahoma) Telephone: 817-334-2350

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Director, Administrative Services Division,
General Services Administration (7BR), 819
Taylor Street, Fort Worth, TX 76102

Region 8

Denver (includes Colorado, North Dakota,
South Dakota, Montana, Utah, and Wyo-
ming) Telephone: 303-776-2231

Director, Administrative Services Division,
General Services Administration (8BR),
Building 41, Denver Federal Center, Den-
ver, CO 80225

Region 9

San Francisco (includes Hawaii, California,
Nevada, and Arizona) Telephone: 415-556-
9130

Director, Administrative Services Division,
General Services Administration (9BR), 525
Market Street, San Francisco, CA 95105

Region 10

Auburn (includes Alaska, Idaho, Oregon, and
Washington) Telephone: 206-931-7128

Director, Administrative Services Division,
General Services Administration (10BR),
GSA Center, Auburn, WA 98002

National Capital Region

Washington, DC (includes the District of Co-
lumbia, the counties of Montgomery and
Prince Georges in Maryland; the city of Al-
exandria and the counties of Arlington,
Fairfax, Loudoun, and Prince William in
Virginia) Telephone: 202-472-1650

Director, Administrative Services Division,
General Services Administration (WBR),
Seventh and D Streets, SW, Washington,
DC 20407

§ 105-64.302 Fees.

§ 105-64.302-1 Records available at a fee.

The manager shall provide one copy of a record to a requester for the fee stated in § 105-64.302-6.

§ 105-64.302-2 Additional copies.

A reasonable number of additional copies shall be provided for a fee if a requester cannot get copies made commercially.

§ 105-64.302-3 Waiver of fee.

The manager should make a copy of a record of up to 50 pages at no charge to a requester who is a GSA employee. The manager may waive the fee if the cost of collecting it is nearly as large as or greater than the fee, or if furnishing the record without charge is customary or in the public interest.

§ 105-64.302-4 Prepayment of fees over \$25.

If a fee is likely to exceed \$25, the manager notifies the person to pay the fee before GSA can make the records available. GSA will remit any overpayment or will send the requester a bill for any change over the amount paid.

§ 105-64.302-5 Form of payment.

Copies must be paid for by check or money order made out to the General Services Administration and addressed to the system manager.

§ 105-64.302-6 Reproduction fee schedule.

(a) The fee for copying a GSA record (by electrostatic copier) of 8 by 14 inches or less is 10 cents a page.

(b) The fee for copying a GSA record more than 8 by 14 inches or one that does not permit copying by routine procedures is the same as that charged commercially.

Subpart 105-64.4—Requests To Amend Records

§ 105-64.401 Submission of requests to amend records.

A person who wants to amend a record containing personal information should send a written request to the GSA Privacy Act Officer. A GSA employee who wants to amend personnel records should send a written request to the General Services Administration, Director of Personnel (EP), Washington, DC 20405. It should show evidence of and justify the need to amend the record. Both the letter and the envelope should be marked "Privacy Act-Request to Amend Record".

§ 105-64.402 Review of requests to amend records.

(a) Managers must acknowledge a request to amend a record within 10 workdays after receiving it. If possible, the acknowledgment should state whether the request will be granted or denied, under § 105-64.404.

(b) In reviewing a record in response to a request to amend, the manager should weigh the accuracy, relevance, timeliness, and completeness of the existing record compared to the proposed

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amendment to decide whether the amendment is justified. On a request to delete information, the manager should also review the request and the existing record to decide whether the information is needed by the agency under a statute or an Executive order.

§ 105-64.403 Approval of requests to amend.

If a manager decides that a record should be amended, he or she must promptly correct it and send the person a corrected copy. If an accounting of disclosure was created to document disclosure of a record, anyone who previously received the record must be informed of the substance of the correction and sent a copy of the corrected record. The manager should advise the Privacy Act Officer that the request to amend was approved.

§ 105-64.404 Denial of requests to amend.

(a) If a manager decides that amending a record is improper or that it should be amended in a different way, he or she refers the request and recommendation to the Head of the Service or Staff Office or Regional Administrator through channels.

(b) If the Head of the Service or Staff Office or Regional Administrator decides to amend the record as requested, he or she should promptly return the request to the manager with instructions to make the amendment under § 105-64.403.

(c) If the Head of the Service or Staff Office or Regional Administrator decides not to amend the record as requested, he or she should promptly advise the requester in writing of the decision. The letter shall (1) state the reason for denying the request; (2) include proposed alternate amendments, if appropriate; (3) state the requester's right to appeal the denial; and (4) tell how to proceed with an appeal.

(d) The Privacy Act Officer must be sent a copy of the original denial of a request to amend a record.

§ 105-64.405 Agreement to alternative amendments.

If the letter denying a request to amend a record proposes alternate amendments and the requester agrees

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to them, he or she must notify the official who signed the letter. The official should promptly instruct the manager to amend the record under § 105-64.403.

§ 105-64.406 Appeal of denial of request to amend a record.

(a) A requester who is denied a request to amend a record may appeal the denial. The appeal should be sent to the General Services Administration, Privacy Act Officer (ATRAI), Washington, DC 20405. If the request involves a record in a GSA employee's official personnel folder, as described in Chapter 293 of the Federal Personnel Manual, the appeal should be addressed to the Director, Bureau of Manpower Information Systems, Office of Personnel Management, Washington, DC 20415.

(b) The appeal to the Privacy Act Officer must be in writing and be received within 30 calendar days after the requester receives the letter stating the request was denied. It should be marked "Privacy Act—Appeal," both on the front of the letter and the envelope.

(c) On receiving an appeal, the Privacy Act Officer should consult with the manager, the official who made the denial, legal counsel, and other officials involved. If the Privacy Act Officer, after consulting with these officials, decides that the record should be amended as requested, he or she must promptly inform the manager to amend it under § 105-64.403 and shall notify the requester.

(d) If the Privacy Act Officer, after consulting with the officials listed in the above paragraph, decides to reject an appeal, he or she should send the file, with a recommendation, to the Deputy Administrator for a final administrative decision.

(e) If the Deputy Administrator decides to change the record, he or she should promptly instruct the manager in writing to amend it under § 105-64.403 and send a copy of the instruction to the Privacy Act Officer, who shall notify the requester.

(f) If the Deputy Administrator rejects an appeal, he or she should

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promptly notify the requester in writing. This is the final administrative decision on the request and should include:

- (1) Why the appeal is rejected;
- (2) Alternate amendments that the requester may accept under § 105-64.405;
- (3) Notice of the requester's right to file a Statement of Disagreement that must be distributed under § 105-64.407; and
- (4) Notice of requester's right to seek court review of the final administrative decision under § 105-64.408.

(g) The final agency decision must be made within 30 workdays from the date the Privacy Act Officer receives the appeal. In unusual circumstances, the Deputy Administrator may extend this time limit by notifying the requester in writing before the 30 days are up. The notice should explain why the limit was extended.

§ 105-64.407 Statements of disagreement.

On receiving a final decision not to amend a record, the requester may file a Statement of Disagreement with the manager. The statement should explain why the requester believes the record to be inaccurate, irrelevant, untimely, or incomplete. The manager must file the statement with the records and include a copy of it in any disclosure of the record. The manager must also provide a copy of the Statement of Disagreement to any person or agency to whom the record has been disclosed if the disclosure was made under the accounting requirement of § 105-64.202.

§ 105-64.408 Judicial review.

For up to 2 years after the final administrative decision under § 105-64.301-4 or § 105-64.406, a requester may seek to have the court overturn the decision. A civil action must be filed in the Federal District Court where the requester lives or has his or her principal place of business, where the agency records are maintained, or in the District of Columbia.

Subpart 105-64.5—Reporting New Systems and Altering Existing Systems

§ 105-64.501 Reporting requirement.

(a) At least 90 calendar days before establishing a new system of records, the manager must notify the Associate Administrator for Policy and Management Systems. The notification must describe and justify each system of records. If the Associate Administrator decides to establish the system, he or she should submit a proposal, at least 60 days before establishing the system, to the President of the Senate, the Speaker of the House of Representatives and the Director of the Office of Management and Budget for evaluating the effect on the privacy and other rights of individuals.

(b) At least 90 calendar days before altering a system of records, the responsible manager must notify the Associate Administrator for Policy and Management Systems. The notification must describe and justify altering the system of records. If the Associate Administrator decides to alter the system, he or she should submit a proposal, at least 60 calendar days before altering the system, to the President of the Senate, the Speaker of the House of Representatives, and the Director of the Office of Management and Budget for evaluating the effect on the privacy and other rights of individuals.

(c) Reports required by this regulation are exempt from reports control.

§ 105-64.502 Federal Register notice of establishment of new system or alteration of existing system.

The Associate Administrator for Policy and Management Systems must publish in the FEDERAL REGISTER a notice of intent to establish or alter a system of records:

(a) If he or she receives notice that the Senate, the House of Representatives, and the Office of Management and Budget (OMB) do not object to establishing or altering a system of records, or

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(b) If 30 calendar days after submitting the proposal neither OMB nor the Congress objects.

§ 105-64.503 Effective date of new systems of records or alteration of an existing system of records.

When there is no objection to establishing or changing a system of records, it becomes effective 30 calendar days after the notice is published in the FEDERAL REGISTER.

Subpart 105-64.6—Exemptions

§ 105-64.601 General exemptions.

The following systems of records are exempt from the Privacy Act of 1974, except subsections (b); (c) (1) and (2); (e)(4) (A) through (F); (e) (6), (7), (9), (10), and (11); and (i) of the Act:

(a) Incident Reporting System, GSA/PBS-3.

(b) Investigation Case Files, ADM-24.

The systems of records GSA/PBS-3 and GSA/ADM-24 are exempt to the extent that information in them relates to enforcing the law, including police efforts to prevent, control, or reduce crime or to apprehend criminals; to the activities of prosecutors, courts, and correctional, probation, pardon, or parole authorities; and to (1) information compiled to identify criminal offenders and alleged offenders, consisting of records of arrests, disposition of criminal charges, sentencing, confinement, release, parole, and probation; (2) information compiled for a criminal investigation, including reports of informants and investigators that identify a person; or (3) reports that identify a person and were prepared while enforcing criminal laws, from arrest or indictment through release from parole. The law exempts these systems to maintain the effectiveness and integrity of the Federal Protective Service and the Office of Inspector General.

§ 105-64.602 Specific exemptions.

The following systems of records are exempt from subsections (c)(3); (d); (e)(1); (e)(4) (G), (H), and (I); and (f) of the Privacy Act of 1974;

(a) Incident Reporting System, GSA/PBS-3.

(b) Investigation Case Files, GSA/ADM-24.

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(c) Security Files, HSA/HRO-37.

The systems are exempt (1) if they contain investigatory material compiled for law enforcement. However, if anyone is denied a right, privilege, or benefit for which they would otherwise be eligible because of the material, it should be provided to the person, except if it discloses the identify of a Government source of information which there is an express promise of confidentiality or before the effective date of this section, under an implied promise of confidentiality and (2) investigatory material compiled solely to decide suitability, eligibility, or qualification for Federal employment, military service, Federal contracts, or access to classified information, when disclosing the material would reveal the identity of a confidential Government informant, or prior to the effective date of this section, under an implied promise that their identity is to be held in confidence. The systems are exempted to maintain the effectiveness and integrity of investigations conducted as part of the Federal Protective Service, Office of Inspector General, and Office of Internal Security law enforcement duties or their responsibilities in the areas of Federal employment, Government contracts, and access to security classified information.

Subpart 105-64.7—Assistance and Referrals

§ 105-64.701 Requests for assistance and referral.

Requests for assistance and referral to a system manager or other GSA employee charged with implementing these regulations are made to the GSA Privacy Officer (ATRAI), General Services Administration, Washington, DC 20405.

PART 105-67—SALE OF PERSONAL PROPERTY

Sec.

105-67.100 Scope of subpart.

105-67.101 Debarred, suspended and ineligible contractors.

AUTHORITY: 40 U.S.C. 486(c).

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§ 105-67.100 Scope of subpart.

This subpart prescribes policies and procedures governing the debarment or suspension of contractors from purchases of Federal personal property (see FPMR part 101-45).

[51 FR 13500, Apr. 21, 1986]

§ 105-67.101 Debarred, suspended and ineligible contractors.

The policies, procedures and requirements of subpart 509.4 of the General Services Administration Acquisition Regulation (GSAR) are incorporated by reference and made applicable to contracts for, and to contractors who engage in, the purchase of Federal personal property.

[51 FR 13500, Apr. 21, 1986]

PART 105-68—GOVERNMENTWIDE DEBARMENT AND SUSPENSION (NONPROCUREMENT) AND GOVERNMENTWIDE REQUIREMENTS FOR DRUG-FREE WORKPLACE (GRANTS)

Subpart 105-68.1—General

Sec.

- 105-68.100 Purpose.
- 105-68.105 Definitions.
- 105-68.110 Coverage.
- 105-68.115 Policy.

Subpart 105-68.2—Effect of Action

- 105-68.200 Debarment or suspension.
- 105-68.205 Ineligible persons.
- 105-68.210 Voluntary exclusion.
- 105-68.215 Exception provision.
- 105-68.220 Continuation of covered transactions.
- 105-68.225 Failure to adhere to restrictions.

Subpart 105-68.3—Debarment

- 105-68.300 General.
- 105-68.305 Causes for debarment.
- 105-68.310 Procedures.
- 105-68.311 Investigation and referral.
- 105-68.312 Notice of proposed debarment.
- 105-68.313 Opportunity to contest proposed debarment.
- 105-68.314 Debarring official's decision.
- 105-68.315 Settlement and voluntary exclusion.
- 105-68.320 Period of debarment.
- 105-68.325 Scope of debarment.

Subpart 105-68.4—Suspension

- 105-68.400 General.
- 105-68.405 Causes for suspension.
- 105-68.410 Procedures.
- 105-68.411 Notice of suspension.
- 105-68.412 Opportunity to contest suspension.
- 105-68.413 Suspending official's decision.
- 105-68.415 Period of suspension.
- 105-68.420 Scope of suspension.

Subpart 105-68.5—Responsibilities of GSA, Agency and Participants

- 105-68.500 GSA responsibilities (information dissemination).
- 105-68.505 GSA responsibilities.
- 105-68.510 Participants' responsibilities.

Subpart 105-68.6—Drug-Free Workplace Requirements (Grants)

- 105-68.600 Purpose.
- 105-68.605 Definitions.
- 105-68.610 Coverage.
- 105-68.615 Grounds for suspension of payments, suspension or termination of grants, or suspension or debarment.
- 105-68.620 Effect of violation.
- 105-68.625 Exception provision.
- 105-68.630 Certification requirements and procedures.
- 105-68.635 Reporting of and employee sanctions for convictions of criminal drug offenses.

APPENDIX A TO PART 105-68—CERTIFICATION REGARDING DEBARMENT, SUSPENSION, AND OTHER RESPONSIBILITY MATTERS—PRIMARY COVERED TRANSACTIONS

APPENDIX B TO PART 105-68—CERTIFICATION REGARDING DEBARMENT, SUSPENSION, INELIGIBILITY AND VOLUNTARY EXCLUSION—LOWER TIER COVERED TRANSACTIONS

APPENDIX C TO PART 105-68—CERTIFICATION REGARDING DRUG-FREE WORKPLACE REQUIREMENTS

AUTHORITY: E.O. 12549; sec. 5151-5160 of the Drug-Free Workplace Act of 1988 (Pub. L. 100-690, Title V, Subtitle D; 41 U.S.C. 701 *et seq.*); 40 U.S.C. 486(c).

SOURCE: 53 FR 19198, 19204, May 26, 1988, unless otherwise noted. Redesignated at 54 FR 4962, Jan. 31, 1989.

CROSS REFERENCE: See also Office of Management and Budget notices 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 53 FR 19160, May 26, 1988, and 53 FR 34474, Sept. 6, 1988.

Subpart 105-68.1—General**§ 105-68.100 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 non-financial 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 §105-68.105), 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 and 33059, June 26, 1995]

§ 105-68.105 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 debaring 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.

GSA. General Services Administration.

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.

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 19198 and 19204, May 26, 1988, as amended at 53 FR 19198, May 26, 1988; 60 FR 33041 and 33059, June 26, 1995]

§ 105-68.110 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.

(b) *Relationship to other sections.* This section describes the types of transactions to which a debarment or suspension under the regulations will apply. Subpart 105–68.2, “Effect of Action,” § 105–68.200, “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 § 105–68.110(a). Sections 105–68.325, “Scope of debarment,” and 105–68.420, “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 19198, 19204, May 26, 1988, as amended at 54 FR 4962, Jan. 31, 1989; 60 FR 33041, 33059, June 26, 1995]

§ 105–68.115 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 105–68.2—Effect of Action

§ 105–68.200 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 § 105–68.215.

(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 § 105–68.110(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;

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(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 and 33059, June 26, 1995]

§ 105-68.205 Ineligible persons.

Persons who are ineligible, as defined in § 105-68.105(i), are excluded in accordance with the applicable statutory, executive order, or regulatory authority.

§ 105-68.210 Voluntary exclusion.

Persons who accept voluntary exclusions under § 105-68.315 are excluded in accordance with the terms of their settlements. GSA shall, and participants may, contact the original action agency to ascertain the extent of the exclusion.

§ 105-68.215 Exception provision.

GSA 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 § 105-68.200. However, in accordance with the President's stated intention in the Executive Order, exceptions shall be granted only infrequently. Exceptions shall be

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reported in accordance with § 105-68.505(a).

[60 FR 33041 and 33059, June 26, 1995]

§ 105-68.220 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 voluntarily excluded, except as provided in § 105-68.215.

[60 FR 33041 and 33059, June 26, 1995]

§ 105-68.225 Failure to adhere to restrictions.

(a) Except as permitted under § 105-68.215 or § 105-68.220, 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

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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 and 33059, June 26, 1995]

Subpart 105–68.3—Debarment

§ 105–68.300 General.

The debarring official may debar a person for any of the causes in § 105–68.305, using procedures established in §§ 105–68.310 through 105–68.314. 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.

§ 105–68.305 Causes for debarment.

Debarment may be imposed in accordance with the provisions of §§ 105–68.300 through 105–68.314 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 anti-trust 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 § 105–68.215 or § 105–68.220;

(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 § 105–68.315 or of any settlement of a debarment or suspension action; or

(5) Violation of any requirement of subpart 105–68.6 of this part, relating to providing a drug-free workplace, as set forth in § 105–68.615 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 19198, 19204, May 26, 1988, as amended at 54 FR 4950 and 4962, Jan. 31, 1989; 56 FR 29438, June 27, 1991]

§ 105–68.310 Procedures.

GSA shall process debarment actions as informally as practicable, consistent with the principles of fundamental fairness, using the procedures in §§ 105–68.311 through 105–68.314 and 48 CFR subpart 509.4.

[53 FR 19198, 19204, May 26, 1988, as amended at 56 FR 29438, June 27, 1991]

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§ 105–68.311 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.

§ 105–68.312 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 § 105–68.305 for proposing debarment;
- (d) Of the provisions of § 105–68.311 through § 105–68.314, and any other GSA procedures, if applicable, governing debarment decisionmaking; and
- (e) Of the potential effect of a debarment.

§ 105–68.313 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.

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§ 105–68.314 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

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(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 §105–68.215.

(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.

§ 105–68.315 Settlement and voluntary exclusion.

(a) When in the best interest of the Government, GSA 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 105–68.5).

[53 FR 19198, 19204, May 26, 1988, as amended at 54 FR 4962, Jan. 31, 1989]

§ 105–68.320 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 105–68.6 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 105–68.6 of this part (see 105–68.305(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 §§105–68.311 through 105–68.314 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 19198, 19204, May 26, 1988, as amended at 54 FR 4950 and 4962, Jan. 31, 1989; 56 FR 29438, June 27, 1991]

§ 105–68.325 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 §§105–68.311 through 105–68.314).

(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

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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 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.

[53 FR 19198, 19204, May 26, 1988, as amended at 56 FR 29438, June 27, 1991]

Subpart 105–68.4—Suspension

§ 105–68.400 General.

(a) The suspending official may suspend a person for any of the causes in § 105–68.405 using procedures established in §§ 105–68.410 through 105–68.413.

(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 § 105–68.405, 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.

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§ 105–68.405 Causes for suspension.

(a) Suspension may be imposed in accordance with the provisions of §§ 105–68.400 through 105–68.413 upon adequate evidence:

(1) To suspect the commission of an offense listed in § 105–68.305(a); or

(2) That a cause for debarment under § 105–68.305 may exist.

(b) Indictment shall constitute adequate evidence for purposes of suspension actions.

§ 105–68.410 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.* GSA shall process suspension actions as informally as practicable, consistent with principles of fundamental fairness, using the procedures in § 105–68.411 through § 105–68.413 and 48 CFR subpart 509.4.

[53 FR 19198, 19204, May 26, 1988, as amended at 56 FR 29438, June 27, 1991]

§ 105–68.411 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 § 105–68.405 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 § 105–68.411 through § 105–68.413 and any other GSA

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procedures, if applicable, governing suspension decisionmaking; and

(g) Of the effect of the suspension.

§ 105-68.412 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.

§ 105-68.413 Suspending official's decision.

The suspending official may modify or terminate the suspension (for example, see § 105-68.320(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 pro-

ceedings 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.

§ 105-68.415 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

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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.

§ 105–68.420 Scope of suspension.

The scope of a suspension is the same as the scope of a debarment (see § 105–68.325), except that the procedures of §§ 105–68.410 through 105–68.413 shall be used in imposing a suspension.

Subpart 105–68.5—Responsibilities of GSA, Agency and Participants

§ 105–68.500 GSA responsibilities (information dissemination).

(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.

[53 FR 19198 and 19204, May 26, 1988, as amended at 53 FR 19198, May 26, 1988]

§ 105–68.505 GSA 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 GSA has granted exceptions under § 105–68.215 permitting participation by debarred, suspended, or voluntarily excluded persons.

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(b) Unless an alternative schedule is agreed to by GSA, the agency shall advise GSA of the information set forth in § 105–68.500(b) and of the exceptions granted under § 105–68.215 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 (202) 501–0688.

(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.

[53 FR 19198, 19204, May 26, 1988, as amended at 56 FR 29439, June 27, 1991]

§ 105–68.510 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 (202) 501–0688. 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 eligibility of their principals. In addition, a participant may, but is not required to, check the Non-procurement List for its principals and for participants (202) 501-0688.

(c) *Changed circumstances regarding certification.* A participant shall provide immediate written notice to GSA 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.

[53 FR 19198, 19204, May 26, 1988, as amended at 56 FR 29439, June 27, 1991]

Subpart 105-68.6—Drug-Free Workplace Requirements (Grants)

SOURCE: 55 FR 21688, 21701, May 25, 1990; 55 FR 26442, June 28, 1990, unless otherwise noted.

§ 105-68.600 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.

§ 105-68.605 Definitions.

(a) Except as amended in this section, the definitions of § 105-68.105 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);

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(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.

§ 105-68.610 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 105-68.1, 105-68.2, 105-68.3, 105-68.4 and 105-68.5 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.

[53 FR 19198, 19204, May 26, 1988, as amended at 56 FR 29438, June 27, 1991]

§ 105-68.615 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 § 105-68.630;

(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) through (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.

§ 105-68.620 Effect of violation.

(a) In the event of a violation of this subpart as provided in § 105-68.615, and in accordance with applicable law, the

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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* §105-68.320(a)(2) of this part).

§ 105-68.625 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.

§ 105-68.630 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 pre-

viously 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.

(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.

(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

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grant, the grant officer may determine a different date on which the policy statement and program shall be in place.

§ 105-68.635 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.

(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.

(Approved by the Office of Management and Budget under control number 0991-0002)

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APPENDIX A TO PART 105-68—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 and 33059, June 26, 1995]

APPENDIX B TO PART 105-68—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 and 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 and 33059, June 26, 1995]

APPENDIX C TO PART 105-68—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);

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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, 21701, May 25, 1990]

PART 105-69—NEW RESTRICTIONS ON LOBBYING

Subpart A—General

Sec.

- 105-69.100 Conditions on use of funds.
- 105-69.105 Definitions.
- 105-69.110 Certification and disclosure.

Subpart B—Activities by Own Employees

- 105-69.200 Agency and legislative liaison.
- 105-69.205 Professional and technical services.
- 105-69.210 Reporting.

Subpart C—Activities by Other Than Own Employees

- 105-69.300 Professional and technical services.

Subpart D—Penalties and Enforcement

- 105-69.400 Penalties.
- 105-69.405 Penalty procedures.
- 105-69.410 Enforcement.

Subpart E—Exemptions

- 105-69.500 Secretary of Defense.

Subpart F—Agency Reports

- 105-69.600 Semi-annual compilation.
- 105-69.605 Inspector General report.

APPENDIX A TO PART 105-69—CERTIFICATION REGARDING LOBBYING

APPENDIX B TO PART 105-69—DISCLOSURE FORM TO REPORT LOBBYING

AUTHORITY: Sec. 319, Pub. L. 101-121 (31 U.S.C. 1352); 40 U.S.C. 486(c).

SOURCE: 55 FR 6737 and 6753, Feb. 26, 1990, unless otherwise noted.

CROSS REFERENCE: See also Office of Management and Budget notice published at 54 FR 52306, December 20, 1989.

Subpart A—General

§ 105-69.100 Conditions on use of funds.

(a) No appropriated funds may be expended by the recipient of a Federal contract, grant, loan, or cooperative agreement 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.

§ 105-69.105 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.

(1) *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 professional 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.

§ 105-69.110 Certification and disclosure.

(a) Each person shall file a certification, and a disclosure form, if required, with each submission that ini-

tiates 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 paragraph (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 paragraph (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 paragraph (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

§ 105-69.200 Agency and legislative liaison.

(a) The prohibition on the use of appropriated funds, in § 105-69.100 (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.

§ 105-69.205 Professional and technical services.

(a) The prohibition on the use of appropriated funds, in § 105-69.100 (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,

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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.

§ 105-69.210 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

§ 105-69.300 Professional and technical services.

(a) The prohibition on the use of appropriated funds, in §105-69.100 (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 §105-69.110 (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

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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

§ 105-69.400 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.

(b) Any person who fails to file or amend the disclosure form (see appendix B) 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.

(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. Second and subsequent offenses by persons shall be subject to an appropriate civil penalty between \$10,000 and \$100,000, 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.

§ 105-69.405 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.

§ 105-69.410 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

§ 105-69.500 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

§ 105-69.600 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.

§ 105-69.605 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.

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(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 105-69— 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.

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.

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.

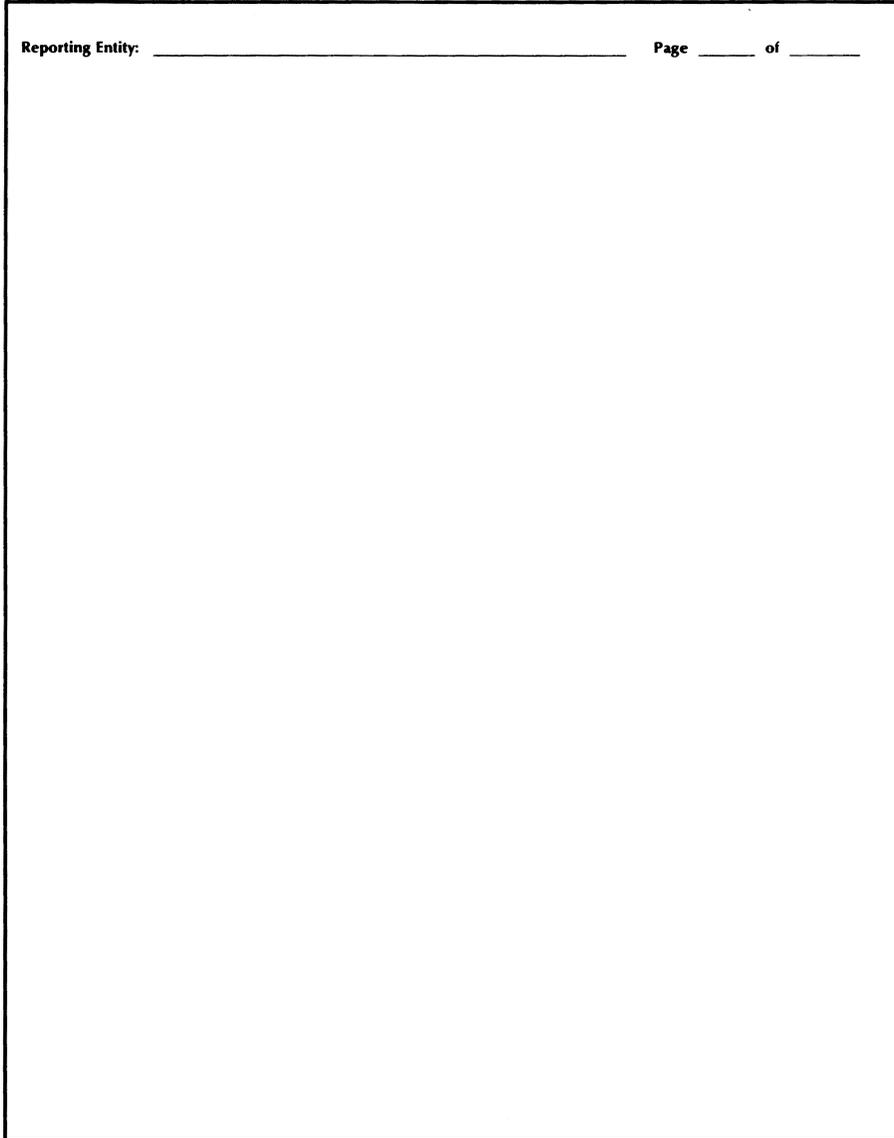
1. Identify the type of covered Federal action for which lobbying activity is and/or has been secured to influence the outcome of a covered Federal action.
2. Identify the status of the covered Federal action.
3. Identify the appropriate classification of this report. If this is a followup report caused 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 minutes 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 _____



Authorized for Local Reproduction
Standard Form - LLL-A

**PART 105-70—IMPLEMENTATION
OF THE PROGRAM FRAUD CIVIL
REMEDIES ACT OF 1986**

SOURCE: 52 FR 45188, Nov. 25, 1987, unless otherwise noted.

§ 105-70.000 Scope.

This part (a) 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 (b) specifies the hearing and appeal rights of persons subject to allegations of liability for such penalties and assessments.

§ 105-70.001 Basis.

This part implements the Program Fraud Civil Remedies Act of 1986, Pub. L. No. 99-509, 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.

§ 105-70.002 Definitions.

The following shall have the meanings ascribed to them below unless the context clearly indicates otherwise:

(a) *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.

(b) *Authority* means the General Services Administration.

(c) *Authority Head* means the Administrator or Deputy Administrator of General Services.

(d) *Benefit* means, in the context of statements, anything of value, including but not limited to any advantage, preference, privilege, license, permit, favorable decision, ruling, status, or loan guarantee.

(e) *Claim* means any request, demand or submission—

(1) Made to the Authority for property, services, or money (including money representing grants, loans, insurance, or benefits);

(2) Made to a recipient of property, services, or money from the Authority or to a party to a contract with the Authority—

(i) For property or services if the United States—

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- 105-70.000 Scope.
 - 105-70.001 Basis.
 - 105-70.002 Definitions.
 - 105-70.003 Basis for civil penalties and assessments.
 - 105-70.004 Investigation.
 - 105-70.005 Review by the reviewing official.
 - 105-70.006 Prerequisites for issuing a complaint.
 - 105-70.007 Complaint.
 - 105-70.008 Service of complaint.
 - 105-70.009 Answer.
 - 105-70.010 Default upon failure to file an answer.
 - 105-70.011 Referral of complaint and answer to the ALJ.
 - 105-70.012 Notice of hearing.
 - 105-70.013 Parties to the hearing.
 - 105-70.014 Separation of functions.
 - 105-70.015 Ex parte contacts.
 - 105-70.016 Disqualification of reviewing official or ALJ.
 - 105-70.017 Rights of parties.
 - 105-70.018 Authority of the ALJ.
 - 105-70.019 Prehearing conferences.
 - 105-70.020 Disclosure of documents.
 - 105-70.021 Discovery.
 - 105-70.022 Exchange of witness lists, statements, and exhibits.
 - 105-70.023 Subpoena for attendance at hearing.
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AUTHORITY: 40 U.S.C. 486(c); 31 U.S.C. 3809.

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(A) Provided such property or services;

(B) Provided any portion of the funds for the purchase of such property or services; or

(C) Will reimburse such recipient or party for the purchase of such property or services; or

(ii) For the payment of money (including money representing grants, loans, insurance, or benefits) if the United States—

(A) Provided any portion of the money requested or demanded, or

(B) Will reimburse such recipient or party for any portion of the money paid on such request of demand; or

(3) Made to the Authority which has the effect of decreasing an obligation to pay or account for property, services, or money.

(f) *Complaint* means the administrative complaint served by the reviewing official on the defendant under §105-70.007.

(g) *Defendant* means any person alleged in a complaint under §105-70.007 to be liable for a civil penalty or assessment under §105-70.003.

(h) *Individual* means a natural person.

(i) *Initial Decision* means the written decision of the ALJ required by §105-70.010 or §105-70.037, and includes a revised initial decision issued following a remand or a motion for reconsideration.

(j) *Investigating Official* means the Inspector General of the General Services Administration 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.

(k) *Knows or has reason to know* means that a person, with respect to a claim or statement—

(1) Has actual knowledge that the claim or statement is false, fictitious, or fraudulent;

(2) Acts in deliberate ignorance of the truth or falsity of the claim or statement; or

(3) Acts in reckless disregard of the truth or falsity of the claim or statement.

(1) *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.

(m) *Person* means any individual, partnership, corporation, association, or private organization.

(n) *Representative* means an 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. (An individual may appear *pro se*; a corporate officer or an owner may represent a business entity.)

(o) *Reviewing Official* means the General Counsel of the General Services Administration or his designee who is—

(1) Not subject to supervision by, or required to report to, the investigating official; and

(2) Not employed in the organizational unit of the authority in which the investigating official is employed; and

(3) 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.

(p) *Statement* means any representation, certification, affirmation, document, record, or accounting or bookkeeping entry made—

(1) With respect to a claim or to obtain the approval or payment of a claim (including relating to eligibility to make a claim); or

(2) With respect to (including relating to eligibility for)—

(i) A contract with, or a bid or proposal for a contract with; or

(ii) 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.

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§ 105-70.003 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 \$5,500 for each such claim.

(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 any payment (including transferred property or provided services) on 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 this 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 \$5,500 for each such statement.

(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 under this section.

(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 provided services), an assessment may be imposed against any such person or jointly and severally against any combination of such persons.

[52 FR 45188, Nov. 25, 1987, as amended at 61 FR 67235, Dec. 20, 1996]

§ 105-70.004 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

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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 the documents sought have been produced, or that such documents are not available and the reasons therefor, or that such documents, suitably identified, have been withheld based upon the assertion of an identified privilege, or any combination of the foregoing.

(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 the reviewing official 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.

§ 105-70.005 Review by the reviewing official.

(a) If, based on the report of the investigating official under § 105-70.004(b), the reviewing official determines that there is adequate evidence to believe that a person is liable under § 105-70.003 of this part, the reviewing official shall transmit to the Attorney General a written notice of the reviewing official's intention to issue a complaint under § 105-70.007.

(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 de-

manded in violation of § 105-70.003 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.

§ 105-70.006 Prerequisites for issuing a complaint.

(a) The reviewing official may issue a complaint under § 105-70.007 only if—

(1) The Department of Justice approves 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 § 105-70.003(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 § 105-70.003(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.

§ 105-70.007 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 defendant, as provided in § 105-70.008.

(b) The complaint shall state—

(1) The allegations of liability against the defendant, including the

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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 defendant may be held liable;

(3) Instructions for filing an answer including a specific statement of the defendant'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, as provided in §105-70.010.

(c) At the same time the reviewing official serves the complaint, he or she shall serve the defendant with a copy of these regulations.

§ 105-70.008 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. Service is complete upon receipt.

(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 serving the complaint by delivery;

(2) A United States Postal Service return receipt card acknowledging receipt; or

(3) Written acknowledgment of receipt by the defendant or his representative.

§ 105-70.009 Answer.

(a) The defendant 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 defendant—

(1) Shall admit or deny each of the allegations of liability made in the complaint;

(2) Shall state any defense on which the defendant intends to rely;

(3) May state any reasons why the defendant 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 defendant to act as defendant's representative, if any.

(c) If the defendant is unable to file an answer meeting the requirements of paragraph (b) of this section within the time provided, the defendant may, before the expiration of 30 days from service of the complaint, file with the reviewing official a general answer denying liability and requesting a hearing, and a request for an extension of time within which to file an answer meeting the requirements of paragraph (b) of this section. The reviewing official shall file promptly with the ALJ the complaint, the general answer denying liability, and the request for an extension of time as provided in §105-70.011. For good cause shown, the ALJ may grant the defendant up to 30 additional days within which to file an answer meeting the requirements of paragraph (b) of this section.

§ 105-70.010 Default upon failure to file an answer.

(a) If the defendant does not file an answer within the time prescribed in §105-70.009(a), the reviewing official may refer the complaint to the ALJ.

(b) Upon the referral of the complaint, the ALJ shall promptly serve on the defendant in the manner prescribed in §105-70.008, 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 §105-70.003, 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 defendant 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 and binding upon the parties 30 days after it is issued.

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(e) If, before such an initial decision becomes final, the defendant files a motion with the ALJ seeking to reopen on the grounds that extraordinary circumstances prevented the defendant from filing an answer, the initial decision shall be stayed pending the ALJ's decision on the motion.

(f) If, on such motion, the defendant 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 defendant an opportunity to answer the complaint.

(g) A decision of the ALJ denying a defendant's motion under paragraph (e) of this section is not subject to reconsideration under §105-70.038.

(h) The defendant 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 defendant 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 defendant'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 defendant's failure to file a timely answer, the Authority Head shall remand the case to the ALJ with instructions to grant the defendant an opportunity to answer.

(l) If the Authority Head decides that the defendant'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.

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§ 105-70.011 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.

§ 105-70.012 Notice of hearing.

(a) When the ALJ receives the complaint and answer, the ALJ shall promptly serve a notice of hearing upon the defendant in the manner prescribed by §105-70.008. 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 defendant, if any; and

(6) Such other matters as the ALJ deems appropriate.

§ 105-70.013 Parties to the hearing.

(a) The parties to the hearing shall be the defendant 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.

§ 105-70.014 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) Except as provided in paragraph (a) of this section, the representative for the Government may be employed anywhere in the Authority, including in the offices of either the investigating official or the reviewing official.

§ 105-70.015 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.

§ 105-70.016 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 not 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.

§ 105-70.017 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 argument 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.

§ 105-70.018 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;

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(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 responsibility of the ALJ under this part.

(c) The ALJ does not have the authority to find Federal statutes or regulations invalid.

§ 105-70.019 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.

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(d) The ALJ may issue an order containing all matters agreed upon by the parties or ordered by the ALJ at a prehearing conference.

§ 105-70.020 Disclosure of documents.

(a) Upon written request to the reviewing official, the defendant may review any relevant and material documents, transcripts, records, and other materials that relate to the allegations set out in the complaint and upon which the findings and conclusions of the investigating official under § 105-70.004(b) are based, unless such documents are subject to a privilege under Federal law. Upon payment of fees for duplication, the defendant may obtain copies of such documents.

(b) Upon written request to the reviewing official, the defendant 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 § 105-70.005 is not discoverable under any circumstances.

(d) The defendant may file a motion to compel disclosure 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 § 105-70.009.

§ 105-70.021 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 §§ 105-70.022 and 105-70.023, 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 ten days of service, a party may file an opposition to the motion and/or a motion for protective order as provided in §105-70.024.

(3) The ALJ may grant a motion for discovery only if he 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 §105-70.024.

(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 §105-70.008.

(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.

§ 105-70.022 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 §105-70.033(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.

§ 105-70.023 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 therefor 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

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to appear and any documents the witness is to produce.

(e) The party seeking the subpoena shall serve it in the manner prescribed in §105-70.008. 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.

§ 105-70.024 Protective order.

(a) A party or 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

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enclosed in sealed envelopes to be opened as directed by the ALJ.

§ 105-70.025 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 Authority, a check for witness fees and mileage need not accompany the subpoena.

§ 105-70.026 Form, filing and service of papers.

(a) *Form.* (1) Documents filed with the ALJ shall include an original and two copies.

(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 or 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 those required to be served as prescribed in §105-70.008 shall be made by delivering a copy or by placing a copy of the document in the United States mail, postage prepaid and addressed 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

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forth the manner of service, shall be proof of service.

§ 105–70.027 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 placing it in the mail, an additional five days will be added to the time permitted for any response.

§ 105–70.028 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.

§ 105–70.029 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.

§ 105–70.030 The hearing and burden of proof.

(a) The ALJ shall conduct a hearing on the record in order to determine whether the defendant is liable for a civil penalty or assessment under § 105–70.003 and, if so, the appropriate amount of any such civil penalty or assessment considering any aggravating or mitigating factors.

(b) The authority shall prove defendant's liability and any aggravating factors by a preponderance of the evidence.

(c) The defendant shall prove any affirmative defenses and any mitigating factors by a preponderance of the evidence.

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(d) The hearing shall be open to the public unless otherwise ordered by the ALJ for good cause shown.

§ 105-70.031 Determining the amount of penalties and assessments.

In determining an appropriate amount of civil penalties and assessments, the ALJ and the Authority Head, upon appeal, should evaluate any circumstances presented that mitigate or aggravate the violation and should articulate in their opinions the reasons that support the penalties and assessments they impose.

§ 105-70.032 Location of hearing.

(a) The hearing may be held—

(1) In any judicial district of the United States in which the defendant 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 defendant 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.

§ 105-70.033 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 statement 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 §105-70.022(a).

(c) The ALJ shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to—

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(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) 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 appearing for the entity *pro se* or 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.

§ 105-70.034 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.

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(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 §105-70.024.

§ 105-70.035 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 §105-70.024.

§ 105-70.036 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.

§ 105-70.037 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 §105-70.003.

(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.

(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 permitted) has expired. The ALJ shall at the same time serve all parties with a statement describing the right of any defendant 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.

§ 105-70.038 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 § 105-70.039.

(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 § 105-70.039.

§ 105-70.039 Appeal to Authority Head.

(a) Any defendant 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) A notice of appeal may be filed at any time within 30 days after the ALJ issues an initial decision. However, if another party files a motion for reconsideration under § 105-70.038, consideration of the appeal shall be stayed automatically pending resolution of the motion for reconsideration.

(2) If a motion for reconsideration is timely filed, a notice of appeal may be filed within 30 days after the ALJ denies the motion or issues a revised initial decision, whichever applies.

(3) The Authority Head may extend the initial 30 day period for an additional 30 days if the defendant files with the Authority Head a request for an extension within the initial 30 day period and shows good cause.

(c) If the defendant files a timely notice of appeal with the Authority Head and the time for filing motions for reconsideration under § 105-70.038 has expired, 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 Authority 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 were 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 defendant has exhausted all administrative remedies under this part and within 60 days after the date on which the Authority Head serves the defendant with a copy of the Authority Head's decision, a determination that a defendant is liable under § 105-70.003 is final and is not subject to judicial review.

§ 105-70.040 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 immediately. The Authority Head may order the process resumed only upon

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receipt of the written authorization of the Attorney General.

§ 105-70.041 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.

§ 105-70.042 Judicial review.

Section 3805 of title 31, United States Code, authorizes 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.

§ 105-70.043 Collection of civil penalties and assessments.

Sections 3806 and 3808(b) of title 31, United States Code, authorize action for collection of civil penalties and assessments imposed under this part and specify the procedures for such actions.

§ 105-70.044 Right to administrative offset.

The amount of any penalty or assessment which has become final, or for which a judgment has been entered under § 105-70.042 or § 105-70.043, or any amount agreed upon in a compromise or settlement under § 105-70.046, may be collected by administrative offset under 30 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 defendant.

§ 105-70.045 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).

§ 105-70.046 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.

(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 § 105-70.042 or during the pendency of any action to collect penalties and assessments under § 105-70.043.

(d) The Attorney General has exclusive authority to compromise or settle a case under this part during the pendency of any review under § 105-70.042 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.

§ 105-70.047 Limitations.

(a) The Program Fraud Civil Remedies Act of 1986 provides that a hearing shall be commenced within 6 years after the date on which a claim or statement is made. 31 U.S.C. 3808(a). The statute also provides that the hearing is commenced by the mailing or delivery of the presiding officer's (ALJ's) notice. 31 U.S.C. 3803(d)(2)(B). Accordingly, the notice of hearing provided for in § 105-70.012 herein shall be served within 6 years after the date on which a claim or statement is made.

(b) If the defendant fails to file a timely answer, service of a notice under § 105-70.010(b) shall be deemed a

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notice of hearing for purposes of this section.

105-71.144 Termination for convenience.

PART 105-71—UNIFORM ADMINISTRATIVE REQUIREMENTS FOR GRANTS AND COOPERATIVE AGREEMENTS WITH STATE AND LOCAL GOVERNMENTS

Subpart 105-71.15—After-the-Grant Requirements

Subpart 105-71.1—General

105-71.150 Closeout.
105-71.151 Later disallowances and adjustments.
105-71.152 Collection of amounts due.

Sec.

105-71.100 Purpose and scope of this part.
105-71.101 Scope of §§105-71.100 through 105-71.105.
105-71.102 Definitions.
105-71.103 Applicability.
105-71.104 Effect on other issuances.
105-71.105 Additions and exceptions.

AUTHORITY: Sec. 205(c), 63 Stat. 390, (40 U.S.C. 486(c)).

SOURCE: 58 FR 43270, Aug. 16, 1993, unless otherwise noted.

Subpart 105-71.1—General

Subpart 105-71.11—Pre-Award Requirements

§ 105-71.100 Purpose and scope of this part.

105-71.110 Forms for applying for grants.
105-71.111 State plans.
105-71.112 Special grant or subgrant conditions for “high-risk” grantees.

This part establishes uniform administrative rules for Federal grants and cooperative agreements and subawards to State, local and Indian tribal governments.

Subpart 105-71.12—Post-Award Requirements/Financial Administration

§ 105-71.101 Scope of §§ 105-71.100 through 105-71.105.

105-71.120 Standards for financial management systems.
105-71.121 Payment.
105-71.122 Allowable costs.
105-71.123 Period of availability of funds.
105-71.124 Matching or cost sharing.
105-71.125 Program income.
105-71.126 Non-Federal audit.

This section contains general rules pertaining to this part and procedures for control of exceptions from this subpart.

Subpart 105-71.13—Post-Award Requirements/Changes, Property, and Subawards

§ 105-71.102 Definitions.

105-71.130 Changes.
105-71.131 Real property.
105-71.132 Equipment.
105-71.133 Supplies.
105-71.134 Copyrights.
105-71.135 Subawards to debarred and suspended parties.
105-71.136 Procurement.
105-71.137 Subgrants.

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.

Subpart 105-71.14—Post-Award Requirements/Reports, Records, Retention, and Enforcement

105-71.140 Monitoring and reporting program performance.
105-71.141 Financial reporting.
105-71.142 Retention and access requirements for records.
105-71.143 Enforcement.

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, non-expendable, 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 non-construction 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 in-kind 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 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 the 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 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.

§ 105-71.103 Applicability.

(a) *General.* Sections 105-71.100 through 105-71.152 of this subpart 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 § 105-71.105 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, 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 Medical 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).

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(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 §105-71.103(a)(3) through (8) are subject to Subpart—Entitlement.

§ 105-71.104 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 §105-71.105.

§ 105-71.105 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.

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Subpart 105-71.11—Pre-Award Requirements

§ 105-71.110 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.

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Previously submitted pages with information that is still current need not be resubmitted.

§ 105–71.111 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.

§ 105–71.112 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 105–71.12—Post-Award Requirements/Financial Administration

§ 105–71.120 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 result 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.

§ 105-71.121 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

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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, 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 conditions, 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 §105-71.143(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.

§ 105-71.122 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

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(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 For-profit organization other than a hospital and an organization named in OMB Circular A-122 as not subject to that circular.	OMB Circular A-21 48 CFR part 31, Contract Cost Principles and Procedures, or uniform cost accounting standards that comply with cost principles acceptable to the Federal agency.

§ 105-71.123 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 or unobligated balances are 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.

§ 105-71.124 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 shar-

ing requirement may be satisfied by either or both of the following:

(1) Allowable costs incurred by the grantee, subgrantee or cost-type contractor under the assistance agreement. This includes allowable costs borne by non-Federal grants or by other 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 apply.

(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 §105-71.125, 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 §105-71.125(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 cost. 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 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 by a grantee or subgrantee by in-

dividuals 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 the 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)(1) 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 §105-71.122, 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 the 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.

§ 105-71.125 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) *Government 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 §105-71.134.)

(f) *Property.* Proceeds from the sale of real property or equipment will be handled in accordance with the requirements of §105-71.131 and §105-71.132.

(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.

§ 105-71.126 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 the 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, § 105-71.136 shall be followed.

[58 FR 43270, Aug. 16, 1993, as amended at 62 FR 45939, 45944, Aug. 29, 1997]

Subpart 105-71.13—Post-Award Requirements/Changes, Property, and Subawards

§ 105-71.130 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 § 105-71.122) 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) *Non-construction 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 non-construction 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 non-construction projects.* When a grant or subgrant provides funding for both construction and non-construction activities, the grantee or subgrantee must obtain prior written approval from the awarding agency before making any

fund or budget transfer from non-construction 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 non-construction 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 § 105-71.136 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 format the grantee used in its application and shall be accomplished by a narrative justification for the proposed revision.

(2) A request for a prior approval under the applicable Federal cost principles (see § 105-71.122) 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.

§ 105-71.131 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 purpose, and the grantee or subgrantee shall not dispose of or encumber its title or other interests.

(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 the 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.

§ 105-71.132 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 §105-71.125(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 the 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 data 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 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 party 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 §105-71.132(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.

§ 105-71.133 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

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not needed for any other federally sponsored programs or projects, the grantee or subgrantee shall compensate the awarding agency for its share.

§ 105-71.134 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:

(a) The copyright in any work developed under a grant, subgrant, or contract under a grant or subgrant; and

(b) Any rights of copyright to which a grantee, subgrantee or a contractor purchases ownership with grant support.

§ 105-71.135 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".

§ 105-71.136 Procurement.

(a) *States.* When procuring property and services under a grant, a State will allow 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 agent will neither solicit nor accept gratuities, favors or anything of monetary value from contractors, potential contractors, or parties to subagreements. Grantees 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 of conduct will provide for penalties, sanctions, or other disciplinary actions for violations of such standards by the grantee'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 analysis 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 un-

less 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 protests 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 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 §105-71.136. 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 §105-71.136(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 reasonableness 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 § 105-71.122). 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 avail-

able, 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 con-

tain 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

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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).

[58 FR 43270, Aug. 16, 1993, as amended at 60 FR 19639, 19644, Apr. 19, 1995]

§ 105-71.137 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 §105-71.142 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 105-71.110;

(2) Section 105-71.111;

(3) The letter-of-credit procedures specified in Treasury Regulations at 31 CFR part 205, cited in §105-71.121; and

(4) Section 105-71.150.

Subpart 105-71.14—Post-Award Requirements/Reports, Records, Retention, and Enforcement

§ 105-71.140 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) *Non-construction 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 semiannual 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 nec-

essary, 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.

§ 105-71.141 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 extent 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 decision making 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 on 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 non-construction grants and for construction grants when required in accordance with paragraph (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 accrual basis, the grantee shall not be required to convert its accounting system but shall develop such accrual information through an 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 of 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

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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 non-construction 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 §105-71.141(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 §105-71.141(d), instead of this form.

(ii) The frequency for submitting reimbursement requests is treated in §105-71.141(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 §105-71.141(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 §105-71.141(d).

(iii) The Federal agency may substitute the Financial Status Report specified in §105-71.141(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 §105-71.141(b)(2).

§105-71.142 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 of subgrantees 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 §105-71.136(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 rates 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 computations are 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.

§ 105-71.143 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) Temporary 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) Without 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

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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 case of a termination, are noncancellable, and,

(2) The cost 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 §105-71.135).

§ 105-71.144 Termination for convenience.

Except as provided in §105-71.143 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.

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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 §105-71.143 or paragraph (a) of this section.

Subpart 105-71.15—After-the-Grant Requirements

§ 105-71.150 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 §105-71.132(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

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advanced that is not authorized to be retained for use on other grants.

§ 105-71.151 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 § 105-71.142;

(d) Property management requirements in § 105-71.131 and § 105-71.132; and

(e) Audit requirements in § 105-71.126.

§ 105-71.152 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 administrative offset against other requests for reimbursement,

(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 Ch.II). The date from which interest is computed is not extended by litigation or the filing of any form of appeal.

Subpart 105-71.16—Entitlements [Reserved]

PART 105-72—UNIFORM ADMINISTRATIVE REQUIREMENTS FOR GRANTS AND AGREEMENTS WITH INSTITUTIONS OF HIGHER EDUCATION, HOSPITALS, AND OTHER NON-PROFIT ORGANIZATIONS

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- 105-72.300 Purpose of financial and program management.
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- 105-72.400 Purpose of property standards.
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- 105-72.406 Intangible property.
- 105-72.407 Property trust relationship.

Subpart 105-72.50—Post-Award Requirements/Procurement Standards

- 105-72.500 Purpose of procurement standards.
- 105-72.501 Recipient responsibilities.
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- 105-72.508 Contract provisions.

Subpart 105-72.60—Post-Award Requirements/Reports and Records

- 105-72.600 Purpose of reports and records.
- 105-72.601 Monitoring and reporting program performance.
- 105-72.602 Financial reporting.
- 105-72.603 Retention and access requirements for records.

Subpart 105-72.70—Post-Award Requirements/Termination and Enforcement

- 105-72.700 Purpose of termination and enforcement.
- 105-72.701 Termination.
- 105-72.702 Enforcement.

Subpart 105-72.80—After-the-Award Requirements

- 105-72.800 Purpose.
- 105-72.801 Closeout procedures.
- 105-72.802 Subsequent adjustments and continuing responsibilities.
- 105-72.803 Collection of amounts due.

APPENDIX A TO PART 105-72—CONTRACT PROVISIONS

AUTHORITY: 40 U.S.C. 486(c).

SOURCE: 59 FR 47268, Sept. 15, 1994, unless otherwise noted.

Subpart 105-72.1—General

§ 105-72.100 Purpose.

This part establishes uniform administrative requirements for Federal grants and agreements awarded to institutions of higher education, hospitals, and other non-profit organizations. Federal awarding agencies shall not impose additional or inconsistent requirements, except as provided in § 105-72.103, and § 105-72.204 or unless specifically required by Federal statute or executive order. Non-profit organizations that implement Federal pro-

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grams for the States are also subject to State requirements.

§ 105-72.101 Definitions.

(a) *Accrued expenditures* means the charges incurred by the recipient during a given period requiring the provision of funds for:

(1) Goods and other tangible property received;

(2) Services performed by employees, contractors, subrecipients, and other payees; and

(3) Other amounts becoming owed under programs for which no current services or performance is required.

(b) *Accrued income* means the sum of:

(1) Earnings during a given period from

(i) Services performed by the recipient, and

(ii) Goods and other tangible property delivered to purchasers, and

(2) Amounts becoming owed to the recipient for which no current services or performance is required by the recipient.

(c) *Acquisition cost of equipment* means the net invoice price of the equipment, 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 recipient's regular accounting practices.

(d) *Advance* means a payment made by Treasury check or other appropriate payment mechanism to a recipient upon its request either before outlays are made by the recipient or through the use of predetermined payment schedules.

(e) *Award* means financial assistance that provides support or stimulation to accomplish a public purpose. Awards include grants and other agreements in the form of money or property in lieu of money, by the Federal Government to an eligible recipient. The term does not include: technical assistance, which provides services instead of money; other assistance in the form of loans, loan guarantees, interest subsidies, or insurance; direct payments of

any kind to individuals; and, contracts which are required to be entered into and administered under procurement laws and regulations.

(f) *Cash contributions* means the recipient's cash outlay, including the outlay of money contributed to the recipient by third parties.

(g) *Closeout* means the process by which a Federal awarding agency determines that all applicable administrative actions and all required work of the award have been completed by the recipient and Federal awarding agency.

(h) *Contract* means a procurement contract under an award or subaward, and a procurement subcontract under a recipient's or subrecipient's contract.

(i) *Cost sharing or matching* means that portion of project or program costs not borne by the Federal Government.

(j) *Date of completion* means the date on which all work under an award is completed or the date on the award document, or any supplement or amendment thereto, on which Federal sponsorship ends.

(k) *Disallowed costs* means those charges to an award that the Federal awarding agency determines to be unallowable, in accordance with the applicable Federal cost principles or other terms and conditions contained in the award.

(l) *Equipment* means tangible non-expendable personal property including exempt property charged directly to the award having a useful life of more than one year and an acquisition cost of \$5000 or more per unit. However, consistent with recipient policy, lower limits may be established.

(m) *Excess property* means property under the control of any Federal awarding agency that, as determined by the head thereof, is no longer required for its needs or the discharge of its responsibilities.

(n) *Exempt property* means tangible personal property acquired in whole or in part with Federal funds, where the Federal awarding agency has statutory authority to vest title in the recipient without further obligation to the Federal Government. An example of exempt property authority is contained in the Federal Grant and Cooperative Agreement Act (31 U.S.C. 6306), for

property acquired under an award to conduct basic or applied research by a non-profit institution of higher education or non-profit organization whose principal purpose is conducting scientific research.

(o) *Federal awarding agency* means the Federal agency that provides an award to the recipient.

(p) *Federal funds authorized* means the total amount of Federal funds obligated by the Federal Government for use by the recipient. This amount may include any authorized carryover of unobligated funds from prior funding periods when permitted by agency regulations or agency implementing instructions.

(q) *Federal share of real property, equipment, or supplies* means that percentage of the property's acquisition costs and any improvement expenditures paid with Federal funds.

(r) *Funding period* means the period of time when Federal funding is available for obligation by the recipient.

(s) *Intangible property and debt instruments* means, but is not limited to, trademarks, copyrights, patents and patent applications and such property as loans, notes and other debt instruments, lease agreements, stock and other instruments of property ownership, whether considered tangible or intangible.

(t) *Obligations* means the amounts of orders placed, contracts and grants awarded, services received and similar transactions during a given period that require payment by the recipient during the same or a future period.

(u) *Outlays or expenditures* means 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 cash disbursements for direct charges for goods and services, the amount of indirect expense charged, the value of third party in-kind contributions applied and the amount of cash advances and payments made to subrecipients. For reports prepared on an accrual basis, outlays are the sum of cash disbursements for direct charges for goods and services, the amount of indirect expense incurred, the value of in-kind contributions applied, and the net increase (or decrease) in the amounts

owed by the recipient for goods and other property received, for services performed by employees, contractors, subrecipients and other payees and other amounts becoming owed under programs for which no current services or performance are required.

(v) *Personal property* means property of any kind except real property. It may be tangible, having physical existence, or intangible, having no physical existence, such as copyrights, patents, or securities.

(w) *Prior approval* means written approval by an authorized official evidencing prior consent.

(x) *Program income* means gross income earned by the recipient that is directly generated by a supported activity or earned as a result of the award (see exclusions in §105-72.304 (e) and (h)). Program income includes, but is not limited to, income from fees for services performed, the use or rental of real or personal property acquired under federally-funded projects, the sale of commodities or items fabricated under an award, license fees and royalties on patents and copyrights, and interest on loans made with award funds. Interest earned on advances of Federal funds is not program income. Except as otherwise provided in Federal awarding agency regulations or the terms and conditions of the award, program income does not include the receipt of principal on loans, rebates, credits, discounts, etc., or interest earned on any of them.

(y) *Project costs* means all allowable costs, as set forth in the applicable Federal cost principles, incurred by a recipient and the value of the contributions made by third parties in accomplishing the objectives of the award during the project period.

(z) *Project period* means the period established in the award document during which Federal sponsorship begins and ends.

(aa) *Property* means, unless otherwise stated, real property, equipment, intangible property and debt instruments.

(bb) *Real property* means land, including land improvements, structures and appurtenances thereto, but excludes movable machinery and equipment.

(cc) *Recipient* means an organization receiving financial assistance directly from Federal awarding agencies to carry out a project or program. The term includes public and private institutions of higher education, public and private hospitals, and other quasi-public and private non-profit organizations such as, but not limited to, community action agencies, research institutes, educational associations, and health centers. The term may include commercial organizations, foreign or international organizations (such as agencies of the United Nations) which are recipients, subrecipients, or contractors or subcontractors of recipients or subrecipients at the discretion of the Federal awarding agency. The term does not include government-owned contractor-operated facilities or research centers providing continued support for mission-oriented, large-scale programs that are government-owned or controlled, or are designated as federally-funded research and development centers.

(dd) *Research and development* means all research activities, both basic and applied, and all development activities that are supported at universities, colleges, and other non-profit 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. The term research also includes activities involving the training of individuals in research techniques where such activities utilize the same facilities as other research and development activities and where such activities are not included in the instruction function.

(ee) *Small awards* means a grant or cooperative agreement not exceeding the small purchase threshold fixed at 41 U.S.C. 403(11) (currently \$25,000).

(ff) *Subaward* means an award of financial assistance in the form of money, or property in lieu of money, made under an award by a recipient to an eligible subrecipient or by a subrecipient to a lower tier subrecipient.

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The term includes financial assistance when provided by any legal agreement, even if the agreement is called a contract, but does not include procurement of goods and services nor does it include any form of assistance which is excluded from the definition of "award" in paragraph 105-72.101(e).

(gg) *Subrecipient* means the legal entity to which a subaward is made and which is accountable to the recipient for the use of the funds provided. The term may include foreign or international organizations (such as agencies of the United Nations) at the discretion of the Federal awarding agency.

(hh) *Supplies* means all personal property excluding equipment, intangible property, and debt instruments as defined in this section, and inventions of a contractor conceived or first actually reduced to practice in the performance of work under a funding agreement ("subject inventions"), as defined in 37 CFR part 401, "Rights to Inventions Made by Nonprofit Organizations and Small Business Firms Under Government Grants, Contracts, and Cooperative Agreements."

(ii) *Suspension* means an action by a Federal awarding agency that temporarily withdraws Federal sponsorship under an award, pending corrective action by the recipient or pending a decision to terminate the award by the Federal awarding agency. Suspension of an award is a separate action from suspension under Federal agency regulations implementing E.O.s 12549 and 12689, "Debarment and Suspension."

(jj) *Termination* means the cancellation of Federal sponsorship, in whole or in part, under an agreement at any time prior to the date of completion.

(kk) *Third party in-kind contributions* means the value of noncash contributions provided by non-Federal third parties. Third party in-kind contributions may be in the form of real property, equipment, supplies and other expendable property, and the value of goods and services directly benefiting and specifically identifiable to the project or program.

(ll) *Unliquidated obligations, for financial reports prepared on a cash basis*, means the amount of obligations incurred by the recipient that have not

been paid. For reports prepared on an accrued expenditure basis, they represent the amount of obligations incurred by the recipient for which an outlay has not been recorded.

(mm) *Unobligated balance* means the portion of the funds authorized by the Federal awarding agency that has not been obligated by the recipient and is determined by deducting the cumulative obligations from the cumulative funds authorized.

(nn) *Unrecovered indirect cost* means the difference between the amount awarded and the amount which could have been awarded under the recipient's approved negotiated indirect cost rate.

(oo) *Working capital advance* means a procedure where by funds are advanced to the recipient to cover its estimated disbursement needs for a given initial period.

§ 105-72.102 Effect on other issuances.

For awards subject to this regulation, all administrative requirements of codified program regulations, program manuals, handbooks and other nonregulatory materials which are inconsistent with the requirements of this regulation shall be superseded, except to the extent they are required by statute, or authorized in accordance with the deviations provision in §105-72.103.

§ 105-72.103 Deviations.

The Office of Management and Budget (OMB) may grant exceptions for classes of grants or recipients subject to the requirements of this regulation when exceptions are not prohibited by statute. However, in the interest of maximum uniformity, exceptions from the requirements of this regulation shall be permitted only in unusual circumstances. Federal awarding agencies may apply more restrictive requirements to a class of recipients when approved by OMB. Federal awarding agencies may apply less restrictive requirements when awarding small awards, except for those requirements which are statutory. Exceptions on a case-by-case basis may also be made by Federal awarding agencies.

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§ 105-72.104 Subawards.

Unless sections of this regulation specifically exclude subrecipients from coverage, the provisions of this regulation shall be applied to subrecipients performing work under awards if such subrecipients are institutions of higher education, hospitals or other non-profit organizations. State and local government subrecipients are subject to the provisions of regulations implementing the grants management common rule, "Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments," 41 CFR 105-71.

Subpart 105-72.2—Pre-Award Requirements

§ 105-72.200 Purpose.

Sections 105-72.201 through 105-72.207 prescribes forms and instructions and other pre-award matters to be used in applying for Federal awards.

§ 105-72.201 Pre-award policies.

(a) *Use of grants and cooperative agreements, and contracts.* In each instance, the Federal awarding agency shall decide on the appropriate award instrument (i.e., grant, cooperative agreement, or contract). The Federal Grant and Cooperative Agreement Act (31 U.S.C. 6301-08) governs the use of grants, cooperative agreements and contracts. A grant or cooperative agreement shall be used only when the principal purpose of a transaction is to accomplish a public purpose of support or stimulation authorized by Federal statute. The statutory criterion for choosing between grants and cooperative agreements is that for the latter, "substantial involvement is expected between the executive agency and the State, local government, or other recipient when carrying out the activity contemplated in the agreement." Contracts shall be used when the principal purpose is acquisition of property or services for the direct benefit or use of the Federal Government.

(b) *Public notice and priority setting.* Federal awarding agencies shall notify the public of its intended funding priorities for discretionary grant programs,

unless funding priorities are established by Federal statute.

§ 105-72.202 Forms for applying for Federal assistance.

(a) Federal awarding agencies shall comply with the applicable report clearance requirements of 5 CFR part 1320, "Controlling Paperwork Burdens on the Public," with regard to all forms used by the Federal awarding agency in place of or as a supplement to the Standard Form 424 (SF-424) series.

(b) Applicants shall use the SF-424 series or those forms and instructions prescribed by the Federal awarding agency.

(c) For Federal programs covered by E.O. 12372, "Intergovernmental Review of Federal Programs," the applicant shall complete the appropriate sections of the SF-424 (Application for Federal Assistance) indicating whether the application was subject to review by the State Single Point of Contact (SPOC). The name and address of the SPOC for a particular State can be obtained from the Federal awarding agency or the Catalog of Federal Domestic Assistance. The SPOC shall advise the applicant whether the program for which application is made has been selected by that State for review.

(d) Federal awarding agencies that do not use the SF-424 form should indicate whether the application is subject to review by the State under E.O. 12372.

§ 105-72.203 Debarment and suspension.

Federal awarding agencies and recipients shall comply with the non-procurement debarment and suspension common rule implementing E.O.s 12549 and 12689, "Debarment and Suspension." This common rule restricts subawards and contracts with certain parties that are debarred, suspended or otherwise excluded from or ineligible for participation in Federal assistance programs or activities.

§ 105-72.204 Special award conditions.

If an applicant or recipient:

- (a) Has a history of poor performance,
- (b) Is not financially stable,

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(c) Has a management system that does not meet the standards prescribed in this regulation,

(d) Has not conformed to the terms and conditions of a previous award, or

(e) Is not otherwise responsible;

Federal awarding agencies may impose additional requirements as needed, provided that such applicant or recipient is notified in writing as to: the nature of the additional requirements, the reason why the additional requirements are being imposed, the nature of the corrective action needed, the time allowed for completing the corrective actions, and the method for requesting reconsideration of the additional requirements imposed. Any special conditions shall be promptly removed once the conditions that prompted them have been corrected.

§ 105-72.205 Metric system of measurement.

The Metric Conversion Act, as amended by the Omnibus Trade and Competitiveness Act (15 U.S.C. 205) declares that the metric system is the preferred measurement system for U.S. trade and commerce. The Act requires each Federal agency to establish a date or dates in consultation with the Secretary of Commerce, when the metric system of measurement will be used in the agency's procurements, grants, and other business-related activities. Metric implementation may take longer where the use of the system is initially impractical or likely to cause significant inefficiencies in the accomplishment of federally-funded activities. Federal awarding agencies shall follow the provisions of E.O. 12770, "Metric Usage in Federal Government Programs."

§ 105-72.206 Resource Conservation and Recovery Act.

Under the Resource Conservation and Recovery Act (RCRA) (Pub. L. 94-580 codified at 42 U.S.C. 6962), any State agency or agency of a political subdivision of a State which is using appropriated Federal funds must comply with section 6002. Section 6002 requires that preference be given in procurement programs to the purchase of specific products containing recycled materials identified in guidelines devel-

oped by the Environmental Protection Agency (EPA) (40 CFR parts 247 through 254). Accordingly, State and local institutions of higher education, hospitals, and non-profit organizations that receive direct Federal awards or other Federal funds shall give preference in their procurement programs funded with Federal funds to the purchase of recycled products pursuant to the EPA guidelines.

§ 105-72.207 Certifications and representations.

Unless prohibited by statute or codified regulation, each Federal awarding agency is authorized and encouraged to allow recipients to submit certifications and representations required by statute, executive order, or regulation on an annual basis, if the recipients have ongoing and continuing relationships with the agency. Annual certifications and representations shall be signed by responsible officials with the authority to ensure recipients' compliance with the pertinent requirements.

Subpart 105-72.30—Post-Award Requirements/Financial and Program Management

§ 105-72.300 Purpose of financial and program management.

Sections 105-72.301 through 105-72.308 prescribe standards for financial management systems, methods for making payments and rules for: satisfying cost sharing and matching requirements, accounting for program income, budget revision approvals, making audits, determining allowability of cost, and establishing fund availability.

§ 105-72.301 Standards for financial management systems.

(a) Federal awarding agencies shall require recipients to relate financial data to performance data and develop unit cost information whenever practical.

(b) Recipients' financial management systems shall provide for the following.

(1) Accurate, current and complete disclosure of the financial results of each federally-sponsored project or program in accordance with the reporting requirements set forth in § 105-

72.602. If a Federal awarding agency requires reporting on an accrual basis from a recipient that maintains its records on other than an accrual basis, the recipient shall not be required to establish an accrual accounting system. These recipients may develop such accrual data for its reports on the basis of an analysis of the documentation on hand.

(2) Records that identify adequately the source and application of funds for federally-sponsored activities. These records shall contain information pertaining to Federal awards, authorizations, obligations, unobligated balances, assets, outlays, income and interest.

(3) Effective control over and accountability for all funds, property and other assets. Recipients shall adequately safeguard all such assets and assure they are used solely for authorized purposes.

(4) Comparison of outlays with budget amounts for each award. Whenever appropriate, financial information should be related to performance and unit cost data.

(5) Written procedures to minimize the time elapsing between the transfer of funds to the recipient from the U.S. Treasury and the issuance or redemption of checks, warrants or payments by other means for program purposes by the recipient. To the extent that the provisions of the Cash Management Improvement Act (CMIA) (Pub. L. 101-453) govern, payment methods of State agencies, instrumentalities, and fiscal agents shall be consistent with CMIA Treasury-State Agreements or the CMIA default procedures codified at 31 CFR part 205, "Withdrawal of Cash from the Treasury for Advances under Federal Grant and Other Programs."

(6) Written procedures for determining the reasonableness, allocability and allowability of costs in accordance with the provisions of the applicable Federal cost principles and the terms and conditions of the award.

(7) Accounting records including cost accounting records that are supported by source documentation.

(c) Where the Federal Government guarantees or insures the repayment of money borrowed by the recipient, the Federal awarding agency, at its discre-

tion, may require adequate bonding and insurance if the bonding and insurance requirements of the recipient are not deemed adequate to protect the interest of the Federal Government.

(d) The Federal awarding agency may require adequate fidelity bond coverage where the recipient lacks sufficient coverage to protect the Federal Government's interest.

(e) Where bonds are required in the situations described above, the bonds shall be obtained from companies holding certificates of authority as acceptable sureties, as prescribed in 31 CFR part 223, "Surety Companies Doing Business with the United States."

§ 105-72.302 Payment.

(a) Payment methods shall minimize the time elapsing between the transfer of funds from the United States Treasury and the issuance or redemption of checks, warrants, or payment by other means by the recipients. Payment methods of State agencies or instrumentalities shall be consistent with Treasury-State CMIA agreements or default procedures codified at 31 CFR part 205.

(b)(1) Recipients are to be paid in advance, provided they maintain or demonstrate the willingness to maintain:

(i) Written procedures that minimize the time elapsing between the transfer of funds and disbursement by the recipient, and

(ii) Financial management systems that meet the standards for fund control and accountability as established in § 105-72.301.

(2) Cash advances to a recipient organization shall be limited to the minimum amounts needed and be timed to be in accordance with the actual, immediate cash requirements of the recipient organization in carrying out the purpose of the approved program or project. The timing and amount of cash advances shall be as close as is administratively feasible to the actual disbursements by the recipient organization for direct program or project costs and the proportionate share of any allowable indirect costs.

(c) Whenever possible, advances shall be consolidated to cover anticipated cash needs for all awards made by the

Federal awarding agency to the recipient.

(1) Advance payment mechanisms include, but are not limited to, Treasury check and electronic funds transfer.

(2) Advance payment mechanisms are subject to 31 CFR part 205.

(3) Recipients shall be authorized to submit requests for advances and reimbursements at least monthly when electronic fund transfers are not used.

(d) Requests for Treasury check advance payment shall be submitted on SF-270, "Request for Advance or Reimbursement," or other forms as may be authorized by OMB. This form is not to be used when Treasury check advance payments are made to the recipient automatically through the use of a predetermined payment schedule or if precluded by special Federal awarding agency instructions for electronic funds transfer.

(e) Reimbursement is the preferred method when the requirements in paragraph (b) cannot be met. Federal awarding agencies may also use this method on any construction agreement, or if the major portion of the construction project is accomplished through private market financing or Federal loans, and the Federal assistance constitutes a minor portion of the project.

(1) When the reimbursement method is used, the Federal awarding agency shall make payment within 30 days after receipt of the billing, unless the billing is improper.

(2) Recipients shall be authorized to submit request for reimbursement at least monthly when electronic funds transfers are not used.

(f) If a recipient cannot meet the criteria for advance payments and the Federal awarding agency has determined that reimbursement is not feasible because the recipient lacks sufficient working capital, the Federal awarding agency may provide cash on a working capital advance basis. Under this procedure, the Federal awarding agency shall advance cash to the recipient to cover its estimated disbursement needs for an initial period generally geared to the awardee's disbursing cycle. Thereafter, the Federal awarding agency shall reimburse the recipient for its actual cash disburse-

ments. The working capital advance method of payment shall not be used for recipients unwilling or unable to provide timely advances to their subrecipient to meet the subrecipient's actual cash disbursements.

(g) To the extent available, recipients shall disburse funds available from repayments to and interest earned on a revolving fund, program income, rebates, refunds, contract settlements, audit recoveries and interest earned on such funds before requesting additional cash payments.

(h) Unless otherwise required by statute, Federal awarding agencies shall not withhold payments for proper charges made by recipients at any time during the project period unless paragraphs (h)(1) or (2) of this section apply.

(1) A recipient has failed to comply with the project objectives, the terms and conditions of the award, or Federal reporting requirements.

(2) The recipient or subrecipient is delinquent in a debt to the United States as defined in OMB Circular A-129, "Managing Federal Credit Programs." Under such conditions, the Federal awarding agency may, upon reasonable notice, inform the recipient that payments shall not be made for obligations incurred after a specified date until the conditions are corrected or the indebtedness to the Federal Government is liquidated.

(i) Standards governing the use of banks and other institutions as depositories of funds advanced under awards are as follows:

(1) Except for situations described in paragraph (i)(2), Federal awarding agencies shall not require separate depository accounts for funds provided to a recipient or establish any eligibility requirements for depositories for funds provided to a recipient. However, recipients must be able to account for the receipt, obligation and expenditure of funds.

(2) Advances of Federal funds shall be deposited and maintained in insured accounts whenever possible.

(j) Consistent with the national goal of expanding the opportunities for women-owned and minority-owned business enterprises, recipients shall be encouraged to use womenowned and

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minority-owned banks (a bank which is owned at least 50 percent by women or minority group members).

(k) Recipients shall maintain advances of Federal funds in interest bearing accounts, unless paragraph (k)(1), (2) or (3) of this section apply.

(1) The recipient receives less than \$120,000 in Federal awards per year.

(2) The best reasonably available interest bearing account would not be expected to earn interest in excess of \$250 per year on Federal cash balances.

(3) The depository would require an average or minimum balance so high that it would not be feasible within the expected Federal and non-Federal cash resources.

(1) For those entities where CMIA and its implementing regulations do not apply, interest earned on Federal advances deposited in interest bearing accounts shall be remitted annually to Department of Health and Human Services, Payment Management System, P.O. Box 6021, Rockville, MD 20852. Interest amounts up to \$250 per year may be retained by the recipient for administrative expense. State universities and hospitals shall comply with CMIA, as it pertains to interest. If an entity subject to CMIA uses its own funds to pay pre-award costs for discretionary awards without prior written approval from the Federal awarding agency, it waives its right to recover the interest under CMIA.

(m) Except as noted elsewhere in this regulation, only the following forms shall be authorized for the recipients in requesting advances and reimbursements. Federal agencies shall not require more than an original and two copies of these forms.

(1) *SF-270, Request for Advance or Reimbursement.* Each Federal awarding agency shall adopt the SF-270 as a standard form for all nonconstruction programs when electronic funds transfer or predetermined advance methods are not used. Federal awarding agencies, however, have the option of using this form for construction programs in lieu of the SF-271, "Outlay Report and Request for Reimbursement for Construction Programs."

(2) *SF-271, Outlay Report and Request for Reimbursement for Construction Programs.* Each Federal awarding agency

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shall adopt the SF-271 as the standard form to be used for requesting reimbursement for construction programs. However, a Federal awarding agency may substitute the SF-270 when the Federal awarding agency determines that it provides adequate information to meet Federal needs.

§ 105-72.303 Cost sharing or matching.

(a) All contributions, including cash and third party in-kind, shall be accepted as part of the recipient's cost sharing or matching when such contributions meet all of the following criteria.

(1) Are verifiable from the recipient's records.

(2) Are not included as contributions for any other federally-assisted project or program.

(3) Are necessary and reasonable for proper and efficient accomplishment of project or program objectives.

(4) Are allowable under the applicable cost principles.

(5) Are not paid by the Federal Government under another award, except where authorized by Federal statute to be used for cost sharing or matching.

(6) Are provided for in the approved budget when required by the Federal awarding agency.

(7) Conform to other provisions of this regulation, as applicable.

(b) Unrecovered indirect costs may be included as part of cost sharing or matching only with the prior approval of the Federal awarding agency.

(c) Values for recipient contributions of services and property shall be established in accordance with the applicable cost principles. If a Federal awarding agency authorizes recipients to donate buildings or land for construction/facilities acquisition projects or long-term use, the value of the donated property for cost sharing or matching shall be the lesser of paragraph (c)(1) or (2) of this section.

(1) The certified value of the remaining life of the property recorded in the recipient's accounting records at the time of donation.

(2) The current fair market value. However, when there is sufficient justification, the Federal awarding agency may approve the use of the current

fair market value of the donated property, even if it exceeds the certified value at the time of donation to the project.

(d) Volunteer services furnished by professional and technical personnel, consultants, and other skilled and unskilled labor may be counted as cost sharing or matching if the service is an integral and necessary part of an approved project or program. Rates for volunteer services shall be consistent with those paid for similar work in the recipient's organization. In those instances in which the required skills are not found in the recipient organization, rates shall be consistent with those paid for similar work in the labor market in which the recipient competes for the kind of services involved. In either case, paid fringe benefits that are reasonable, allowable, and allocable may be included in the valuation.

(e) When an employer other than the recipient furnishes the services of an employee, these services shall be valued at the employee's regular rate of pay (plus an amount of fringe benefits that are reasonable, allowable, and allocable, but exclusive of overhead costs), provided these services are in the same skill for which the employee is normally paid.

(f) Donated supplies may include such items as expendable equipment, office supplies, laboratory supplies or workshop and classroom supplies. Value assessed to donated supplies included in the cost sharing or matching share shall be reasonable and shall not exceed the fair market value of the property at the time of the donation.

(g) The method used for determining cost sharing or matching for donated equipment, buildings and land for which title passes to the recipient may differ according to the purpose of the award, if paragraph (g)(1) or (2) of this section apply.

(1) If the purpose of the award is to assist the recipient in the acquisition of equipment, buildings or land, the total value of the donated property may be claimed as cost sharing or matching.

(2) If the purpose of the award is to support activities that require the use of equipment, buildings or land, normally only depreciation or use charges

for equipment and buildings may be made. However, the full value of equipment or other capital assets and fair rental charges for land may be allowed, provided that the Federal awarding agency has approved the charges.

(h) The value of donated property shall be determined in accordance with the usual accounting policies of the recipient, with the following qualifications.

(1) The value of donated land and buildings shall not exceed its fair market value at the time of donation to the recipient as established by an independent appraiser (e.g., certified real property appraiser or General Services Administration representative) and certified by a responsible official of the recipient.

(2) The value of donated equipment shall not exceed the fair market value of equipment of the same age and condition at the time of donation.

(3) The value of donated space shall not exceed the fair rental value of comparable space as established by an independent appraisal of comparable space and facilities in a privately-owned building in the same locality.

(4) The value of loaned equipment shall not exceed its fair rental value.

(5) The following requirements pertain to the recipient's supporting records for in-kind contributions from third parties.

(i) Volunteer services shall be documented and, to the extent feasible, supported by the same methods used by the recipient for its own employees.

(ii) The basis for determining the valuation for personal service, material, equipment, buildings and land shall be documented.

§ 105-72.304 Program income.

(a) Federal awarding agencies shall apply the standards set forth in this section in requiring recipient organizations to account for program income related to projects financed in whole or in part with Federal funds.

(b) Except as provided in paragraph (h) of this section, program income earned during the project period shall be retained by the recipient and, in accordance with Federal awarding agency regulations or the terms and conditions of the award, shall be used in one

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or more of the ways listed in the following.

(1) Added to funds committed to the project by the Federal awarding agency and recipient and used to further eligible project or program objectives.

(2) Used to finance the non-Federal share of the project or program.

(3) Deducted from the total project or program allowable cost in determining the net allowable costs on which the Federal share of costs is based.

(c) When an agency authorizes the disposition of program income as described in paragraphs (b)(1) or (b)(2), program income in excess of any limits stipulated shall be used in accordance with paragraph (b)(3).

(d) In the event that the Federal awarding agency does not specify in its regulations or the terms and conditions of the award how program income is to be used, paragraph (b)(3) shall apply automatically to all projects or programs except research. For awards that support research, paragraph (b)(1) shall apply automatically unless the awarding agency indicates in the terms and conditions another alternative on the award or the recipient is subject to special award conditions, as indicated in §105-72.204.

(e) Unless Federal awarding agency regulations or the terms and conditions of the award provide otherwise, recipients shall have no obligation to the Federal Government regarding program income earned after the end of the project period.

(f) If authorized by Federal awarding agency regulations or the terms and conditions of the award, costs incident to the generation of program income may be deducted from gross income to determine program income, provided these costs have not been charged to the award.

(g) Proceeds from the sale of property shall be handled in accordance with the requirements of the Property Standards (See §105-72.400 through §105-72.407).

(h) Unless Federal awarding agency regulations or the terms and condition of the award provide otherwise, recipients shall have no obligation to the Federal Government with respect to program income earned from license fees and royalties for copyrighted ma-

terial, patents, patent applications, trademarks, and inventions produced under an award. However, Patent and Trademark Amendments (35 U.S.C. 18) apply to inventions made under an experimental, developmental, or research award.

§105-72.305 Revision of budget and program plans.

(a) The budget plan is the financial expression of the project or program as approved during the award process. It may include either the Federal and non-Federal share, or only the Federal share, depending upon Federal awarding agency requirements. It shall be related to performance for program evaluation purposes whenever appropriate.

(b) Recipients are required to report deviations from budget and program plans, and request prior approvals for budget and program plan revisions, in accordance with this section.

(c) For nonconstruction awards, recipients shall request prior approvals from Federal awarding agencies for one or more of the following program or budget related reasons.

(1) Change in the scope or the objective of the project or program (even if there is no associated budget revision requiring prior written approval).

(2) Change in a key person specified in the application or award document.

(3) The absence for more than three months, or a 25 percent reduction in time devoted to the project, by the approved project director or principal investigator.

(4) The need for additional Federal funding.

(5) The transfer of amounts budgeted for indirect costs to absorb increases in direct costs, or vice versa, if approval is required by the Federal awarding agency.

(6) The inclusion, unless waived by the Federal awarding agency, of costs that require prior approval in accordance with OMB Circular A-21, "Cost Principles for Institutions of Higher Education," OMB Circular A-122, "Cost Principles for Non-Profit Organizations," or 45 CFR part 74 appendix E, "Principles for Determining Costs Applicable to Research and Development under Grants and Contracts with Hospitals," or 48 CFR part 31, "Contract

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Cost Principles and Procedures,” as applicable.

(7) The transfer of funds allotted for training allowances (direct payment to trainees) to other categories of expense.

(8) Unless described in the application and funded in the approved awards, the subaward, transfer or contracting out of any work under an award. This provision does not apply to the purchase of supplies, material, equipment or general support services.

(d) No other prior approval requirements for specific items may be imposed unless a deviation has been approved by OMB.

(e) Except for requirements listed in paragraphs (c)(1) and (c)(4) of this section, Federal awarding agencies are authorized, at their option, to waive cost-related and administrative prior written approvals required by this regulation and OMB Circulars A-21 and A-122. Such waivers may include authorizing recipients to do any one or more of the following.

(1) Incur pre-award costs 90 calendar days prior to award or more than 90 calendar days with the prior approval of the Federal awarding agency. All pre-award costs are incurred at the recipient’s risk (i.e., the Federal awarding agency is under no obligation to reimburse such costs if for any reason the recipient does not receive an award or if the award is less than anticipated and inadequate to cover such costs).

(2) Initiate a one-time extension of the expiration date of the award of up to 12 months unless one or more of the following conditions apply. For one-time extensions, the recipient must notify the Federal awarding agency in writing with the supporting reasons and revised expiration date at least 10 days before the expiration date specified in the award. This one-time extension may not be exercised merely for the purpose of using unobligated balances.

(i) The terms and conditions of award prohibit the extension.

(ii) The extension requires additional Federal funds.

(iii) The extension involves any change in the approved objectives or scope of the project.

(3) Carry forward unobligated balances to subsequent funding periods.

(4) For awards that support research, unless the Federal awarding agency provides otherwise in the award or in the agency’s regulations, the prior approval requirements described in paragraph (e) are automatically waived (i.e., recipients need not obtain such prior approvals) unless one of the conditions included in paragraph (e)(2) applies.

(f) The Federal awarding agency may, at its option, restrict the transfer of funds among direct cost categories or programs, functions and activities for awards in which the Federal share of the project exceeds \$100,000 and the cumulative amount of such transfers exceeds or is expected to exceed 10 percent of the total budget as last approved by the Federal awarding agency. No Federal awarding agency shall permit a transfer that would cause any Federal appropriation or part thereof to be used for purposes other than those consistent with the original intent of the appropriation.

(g) All other changes to nonconstruction budgets, except for the changes described in paragraph (j), do not require prior approval.

(h) For construction awards, recipients shall request prior written approval promptly from Federal awarding agencies for budget revisions whenever paragraphs (h)(1), (2) or (3) of this section apply.

(1) The revision results from changes in the scope or the objective of the project or program.

(2) The need arises for additional Federal funds to complete the project.

(3) A revision is desired which involves specific costs for which prior written approval requirements may be imposed consistent with applicable OMB cost principles listed in §105-72.307.

(i) No other prior approval requirements for specific items may be imposed unless a deviation has been approved by OMB.

(j) When a Federal awarding agency makes an award that provides support for both construction and nonconstruction work, the Federal awarding agency may require the recipient to request

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prior approval from the Federal awarding agency before making any fund or budget transfers between the two types of work supported.

(k) For both construction and non-construction awards, Federal awarding agencies shall require recipients to notify the Federal awarding agency in writing promptly whenever the amount of Federal authorized funds is expected to exceed the needs of the recipient for the project period by more than \$5000 or five percent of the Federal award, whichever is greater. This notification shall not be required if an application for additional funding is submitted for a continuation award.

(l) When requesting approval for budget revisions, recipients shall use the budget forms that were used in the application unless the Federal awarding agency indicates a letter of request suffices.

(m) Within 30 calendar days from the date of receipt of the request for budget revisions, Federal awarding agencies shall review the request and notify the recipient whether the budget revisions have been approved. If the revision is still under consideration at the end of 30 calendar days, the Federal awarding agency shall inform the recipient in writing of the date when the recipient may expect the decision.

§ 105-72.306 Non-Federal audits.

(a) Recipients and subrecipients that are institutions of higher education or other non-profit organizations (including hospitals) shall be subject to the audit requirements contained in 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."

(b) State and local governments shall be subject to the audit requirements contained in 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."

(c) For-profit hospitals not covered by the audit provisions of revised OMB Circular A-133 shall be subject to the

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audit requirements of the Federal awarding agencies.

(d) Commercial organizations shall be subject to the audit requirements of the Federal awarding agency or the prime recipient as incorporated into the award document.

[59 FR 47268, Sept. 15, 1994, as amended at 62 FR 45939, 45944, Aug. 29, 1997]

§ 105-72.307 Allowable costs.

For each kind of recipient, there is a set of Federal principles for determining allowable costs. Allowability of costs shall be determined in accordance with the cost principles applicable to the entity incurring the costs. Thus, allowability of costs incurred by State, local or federally-recognized Indian tribal governments is determined in accordance with the provisions of OMB Circular A-87, "Cost Principles for State and Local Governments." The allowability of costs incurred by non-profit organizations is determined in accordance with the provisions of OMB Circular A-122, "Cost Principles for Non-Profit Organizations." The allowability of costs incurred by institutions of higher education is determined in accordance with the provisions of OMB Circular A-21, "Cost Principles for Educational Institutions." The allowability of costs incurred by hospitals is determined in accordance with the provisions of appendix E of 45 CFR part 74, "Principles for Determining Costs Applicable to Research and Development Under Grants and Contracts with Hospitals." The allowability of costs incurred by commercial organizations and those non-profit organizations listed in Attachment C to Circular A-122 is determined in accordance with the provisions of the Federal Acquisition Regulation (FAR) at 48 CFR part 31.

§ 105-72.308 Period of availability of funds.

Where a funding period is specified, a recipient may charge to the grant only allowable costs resulting from obligations incurred during the funding period and any pre-award costs authorized by the Federal awarding agency.

Subpart 105-72.40—Post-Award Requirements/Property Standards

§ 105-72.400 Purpose of property standards.

Sections 105-72.401 through 105-72.407 set forth uniform standards governing management and disposition of property furnished by the Federal Government whose cost was charged to a project supported by a Federal award. Federal awarding agencies shall require recipients to observe these standards under awards and shall not impose additional requirements, unless specifically required by Federal statute. The recipient may use its own property management standards and procedures provided it observes the provisions of § 105-72.401 through § 105-72.407.

§ 105-72.401 Insurance coverage.

Recipients shall, at a minimum, provide the equivalent insurance coverage for real property and equipment acquired with Federal funds as provided to property owned by the recipient. Federally-owned property need not be insured unless required by the terms and conditions of the award.

§ 105-72.402 Real property.

Each Federal awarding agency shall prescribe requirements for recipients concerning the use and disposition of real property acquired in whole or in part under awards. Unless otherwise provided by statute, such requirements, at a minimum, shall contain the following.

(a) Title to real property shall vest in the recipient subject to the condition that the recipient shall use the real property for the authorized purpose of the project as long as it is needed and shall not encumber the property without approval of the Federal awarding agency.

(b) The recipient shall obtain written approval by the Federal awarding agency for the use of real property in other federally-sponsored projects when the recipient determines that the property is no longer needed for the purpose of the original project. Use in other projects shall be limited to those under federally-sponsored projects (i.e., awards) or programs that have purposes consistent with those authorized

for support by the Federal awarding agency.

(c) When the real property is no longer needed as provided in paragraphs (a) and (b), the recipient shall request disposition instructions from the Federal awarding agency or its successor Federal awarding agency. The Federal awarding agency shall observe one or more of the following disposition instructions.

(1) The recipient may be permitted to retain title without further obligation to the Federal Government after it compensates the Federal Government for that percentage of the current fair market value of the property attributable to the Federal participation in the project.

(2) The recipient may be directed to sell the property under guidelines provided by the Federal awarding agency and pay the Federal Government for that percentage of the current fair market value of the property attributable to the Federal participation in the project (after deducting actual and reasonable selling and fix-up expenses, if any, from the sales proceeds). When the recipient is authorized or required to sell the property, proper sales procedures shall be established that provide for competition to the extent practicable and result in the highest possible return.

(3) The recipient may be directed to transfer title to the property to the Federal Government or to an eligible third party provided that, in such cases, the recipient shall be entitled to compensation for its attributable percentage of the current fair market value of the property.

§ 105-72.403 Federally-owned and exempt property.

(a) *Federally-owned property.* (1) Title to federally-owned property remains vested in the Federal Government. Recipients shall submit annually an inventory listing of federally-owned property in their custody to the Federal awarding agency. Upon completion of the award or when the property is no longer needed, the recipient shall report the property to the Federal awarding agency for further Federal agency utilization.

(2) If the Federal awarding agency has no further need for the property, it shall be declared excess and reported to the General Services Administration, unless the Federal awarding agency has statutory authority to dispose of the property by alternative methods (e.g., the authority provided by the Federal Technology Transfer Act (15 U.S.C. 3710 (I)) to donate research equipment to educational and non-profit organizations in accordance with E.O. 12821, "Improving Mathematics and Science Education in Support of the National Education Goals.") Appropriate instructions shall be issued to the recipient by the Federal awarding agency.

(b) *Exempt property.* When statutory authority exists, the Federal awarding agency has the option to vest title to property acquired with Federal funds in the recipient without further obligation to the Federal Government and under conditions the Federal awarding agency considers appropriate. Such property is "exempt property." Should a Federal awarding agency not establish conditions, title to exempt property upon acquisition shall vest in the recipient without further obligation to the Federal Government.

§ 105-72.404 Equipment.

(a) Title to equipment acquired by a recipient with Federal funds shall vest in the recipient, subject to conditions of this section.

(b) The recipient shall not use equipment acquired with Federal funds to provide services to non-Federal outside organizations for a fee that is less than private companies charge for equivalent services, unless specifically authorized by Federal statute, for as long as the Federal Government retains an interest in the equipment.

(c) The recipient shall use the equipment in the project or program for which it was acquired as long as needed, whether or not the project or program continues to be supported by Federal funds and shall not encumber the property without approval of the Federal awarding agency. When no longer needed for the original project or program, the recipient shall use the equipment in connection with its other fed-

erally-sponsored activities, in the following order of priority:

(1) Activities sponsored by the Federal awarding agency which funded the original project, then

(2) Activities sponsored by other Federal awarding agencies.

(d) During the time that equipment is used on the project or program for which it was acquired, the recipient shall make it available for use on other projects or programs if such other use will not interfere with the work on the project or program for which the equipment was originally acquired. First preference for such other use shall be given to other projects or programs sponsored by the Federal awarding agency that financed the equipment; second preference shall be given to projects or programs sponsored by other Federal awarding agencies. If the equipment is owned by the Federal Government, use on other activities not sponsored by the Federal Government shall be permissible if authorized by the Federal awarding agency. User charges shall be treated as program income.

(e) When acquiring replacement equipment, the recipient may use the equipment to be replaced as trade-in or sell the equipment and use the proceeds to offset the costs of the replacement equipment subject to the approval of the Federal awarding agency.

(f) The recipient's property management standards for equipment acquired with Federal funds and federally-owned equipment shall include all of the following.

(1) Equipment records shall be maintained accurately and shall include the following information.

- (i) A description of the equipment.
- (ii) Manufacturer's serial number, model number, Federal stock number, national stock number, or other identification number.
- (iii) Source of the equipment, including the award number.
- (iv) Whether title vests in the recipient or the Federal Government.
- (v) Acquisition date (or date received, if the equipment was furnished by the Federal Government) and cost.
- (vi) Information from which one can calculate the percentage of Federal

participation in the cost of the equipment (not applicable to equipment furnished by the Federal Government).

(vii) Location and condition of the equipment and the date the information was reported.

(viii) Unit acquisition cost.

(ix) Ultimate disposition data, including date of disposal and sales price or the method used to determine current fair market value where a recipient compensates the Federal awarding agency for its share.

(2) Equipment owned by the Federal Government shall be identified to indicate Federal ownership.

(3) A physical inventory of equipment shall be taken and the results reconciled with the equipment records at least once every two years. Any differences between quantities determined by the physical inspection and those shown in the accounting records shall be investigated to determine the causes of the difference. The recipient shall, in connection with the inventory, verify the existence, current utilization, and continued need for the equipment.

(4) A control system shall be in effect to insure adequate safeguards to prevent loss, damage, or theft of the equipment. Any loss, damage, or theft of equipment shall be investigated and fully documented; if the equipment was owned by the Federal Government, the recipient shall promptly notify the Federal awarding agency.

(5) Adequate maintenance procedures shall be implemented to keep the equipment in good condition.

(6) Where the recipient is authorized or required to sell the equipment, proper sales procedures shall be established which provide for competition to the extent practicable and result in the highest possible return.

(g) When the recipient no longer needs the equipment, the equipment may be used for other activities in accordance with the following standards. For equipment with a current per unit fair market value of \$5000 or more, the recipient may retain the equipment for other uses provided that compensation is made to the original Federal awarding agency or its successor. The amount of compensation shall be computed by applying the percentage of

Federal participation in the cost of the original project or program to the current fair market value of the equipment. If the recipient has no need for the equipment, the recipient shall request disposition instructions from the Federal awarding agency. The Federal awarding agency shall determine whether the equipment can be used to meet the agency's requirements. If no requirement exists within that agency, the availability of the equipment shall be reported to the General Services Administration by the Federal awarding agency to determine whether a requirement for the equipment exists in other Federal agencies. The Federal awarding agency shall issue instructions to the recipient no later than 120 calendar days after the recipient's request and the following procedures shall govern.

(1) If so instructed or if disposition instructions are not issued within 120 calendar days after the recipient's request, the recipient shall sell the equipment and reimburse the Federal awarding agency an amount computed by applying to the sales proceeds the percentage of Federal participation in the cost of the original project or program. However, the recipient shall be permitted to deduct and retain from the Federal share \$500 or ten percent of the proceeds, whichever is less, for the recipient's selling and handling expenses.

(2) If the recipient is instructed to ship the equipment elsewhere, the recipient shall be reimbursed by the Federal Government by an amount which is computed by applying the percentage of the recipient's participation in the cost of the original project or program to the current fair market value of the equipment, plus any reasonable shipping or interim storage costs incurred.

(3) If the recipient is instructed to otherwise dispose of the equipment, the recipient shall be reimbursed by the Federal awarding agency for such costs incurred in its disposition.

(4) The Federal awarding agency may reserve the right to transfer the title to the Federal Government or to a third party named by the Federal Government when such third party is otherwise eligible under existing statutes.

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Such transfer shall be subject to the following standards.

(i) The equipment shall be appropriately identified in the award or otherwise made known to the recipient in writing.

(ii) The Federal awarding agency shall issue disposition instructions within 120 calendar days after receipt of a final inventory. The final inventory shall list all equipment acquired with grant funds and federally-owned equipment. If the Federal awarding agency fails to issue disposition instructions within the 120 calendar day period, the recipient shall apply the standards of this section, as appropriate.

(iii) When the Federal awarding agency exercises its right to take title, the equipment shall be subject to the provisions for federally-owned equipment.

§ 105-72.405 Supplies and other expendable property.

(a) Title to supplies and other expendable property shall vest in the recipient upon acquisition. If there is a residual inventory of unused supplies exceeding \$5000 in total aggregate value upon termination or completion of the project or program and the supplies are not needed for any other federally-sponsored project or program, the recipient shall retain the supplies for use on non-Federal sponsored activities or sell them, but shall, in either case, compensate the Federal Government for its share. The amount of compensation shall be computed in the same manner as for equipment.

(b) The recipient shall not use supplies acquired with Federal funds to provide services to non-Federal outside organizations for a fee that is less than private companies charge for equivalent services, unless specifically authorized by Federal statute as long as the Federal Government retains an interest in the supplies.

§ 105-72.406 Intangible property.

(a) The recipient may copyright any work that is subject to copyright and was developed, or for which ownership was purchased, under an award. The

Federal awarding agency(ies) reserve a royalty-free, nonexclusive and irrevocable right to reproduce, publish, or otherwise use the work for Federal purposes, and to authorize others to do so.

(b) Recipients are subject to applicable regulations governing patents and inventions, including governmentwide regulations issued by the Department of Commerce at 37 CFR part 401, "Rights to Inventions Made by Non-profit Organizations and Small Business Firms Under Government Grants, Contracts and Cooperative Agreements."

(c) Unless waived by the Federal awarding agency, the Federal Government has the right to paragraph (c)(1) and (2) of this section.

(1) Obtain, reproduce, publish or otherwise use the data first produced under an award.

(2) Authorize others to receive, reproduce, publish, or otherwise use such data for Federal purposes.

(d) Title to intangible property and debt instruments acquired under an award or subaward vests upon acquisition in the recipient. The recipient shall use that property for the originally-authorized purpose, and the recipient shall not encumber the property without approval of the Federal awarding agency. When no longer needed for the originally authorized purpose, disposition of the intangible property shall occur in accordance with the provisions of § 105-72.404(g).

§ 105-72.407 Property trust relationship.

Real property, equipment, intangible property and debt instruments that are acquired or improved with Federal funds shall be held in trust by the recipient as trustee for the beneficiaries of the project or program under which the property was acquired or improved. Agencies may require recipients to record liens or other appropriate notices of record to indicate that personal or real property has been acquired or improved with Federal funds and that use and disposition conditions apply to the property.

Subpart 105-72.50—Post-Award Requirements/Procurement Standards**§ 105-72.500 Purpose of procurement standards.**

Sections 105-72.501 through 105-72.508 set forth standards for use by recipients in establishing procedures for the procurement of supplies and other expendable property, equipment, real property and other services with Federal funds. These standards are furnished to ensure that such materials and services are obtained in an effective manner and in compliance with the provisions of applicable Federal statutes and executive orders. No additional procurement standards or requirements shall be imposed by the Federal awarding agencies upon recipients, unless specifically required by Federal statute or executive order or approved by OMB.

§ 105-72.501 Recipient responsibilities.

The standards contained in this section do not relieve the recipient of the contractual responsibilities arising under its contract(s). The recipient is the responsible authority, without recourse to the Federal awarding agency, regarding the settlement and satisfaction of all contractual and administrative issues arising out of procurements entered into in support of an award or other agreement. This includes disputes, claims, protests of award, source evaluation or other matters of a contractual nature. Matters concerning violation of statute are to be referred to such Federal, State or local authority as may have proper jurisdiction.

§ 105-72.502 Codes of conduct.

The recipient shall maintain written standards of conduct governing the performance of its employees engaged in the award and administration of contracts. No employee, officer, or agent shall participate in the selection, award, or administration of a contract supported by Federal funds if a real or apparent conflict of interest would be involved. Such a conflict would arise when the employee, officer, or agent, any member of his or her immediate family, his or her partner, or an organization which employs or is about to

employ any of the parties indicated herein, has a financial or other interest in the firm selected for an award. The officers, employees, and agents of the recipient shall neither solicit nor accept gratuities, favors, or anything of monetary value from contractors, or parties to subagreements. However, recipients may set standards for situations in which the financial interest is not substantial or the gift is an unsolicited item of nominal value. The standards of conduct shall provide for disciplinary actions to be applied for violations of such standards by officers, employees, or agents of the recipient.

§ 105-72.503 Competition.

All procurement transactions shall be conducted in a manner to provide, to the maximum extent practical, open and free competition. The recipient shall be alert to organizational conflicts of interest as well as noncompetitive practices among contractors that may restrict or eliminate competition or otherwise restrain trade. In order to ensure objective contractor performance and eliminate unfair competitive advantage, contractors that develop or draft specifications, requirements, statements of work, invitations for bids and/or requests for proposals shall be excluded from competing for such procurements. Awards shall be made to the bidder or offeror whose bid or offer is responsive to the solicitation and is most advantageous to the recipient, price, quality and other factors considered. Solicitations shall clearly set forth all requirements that the bidder or offeror shall fulfill in order for the bid or offer to be evaluated by the recipient. Any and all bids or offers may be rejected when it is in the recipient's interest to do so.

§ 105-72.504 Procurement procedures.

(a) All recipients shall establish written procurement procedures. These procedures shall provide for, at a minimum, that paragraphs (a)(1), (2) and (3) of this section apply.

(1) Recipients avoid purchasing unnecessary items.

(2) Where appropriate, an analysis is made of lease and purchase alternatives to determine which would be

the most economical and practical procurement for the Federal Government.

(3) Solicitations for goods and services provide for all of the following.

(i) A clear and accurate description of the technical requirements for the material, product or service to be procured. In competitive procurements, such a description shall not contain features which unduly restrict competition.

(ii) Requirements which the bidder/offeror must fulfill and all other factors to be used in evaluating bids or proposals.

(iii) A description, whenever practicable, of technical requirements in terms of functions to be performed or performance required, including the range of acceptable characteristics or minimum acceptable standards.

(iv) The specific features of "brand name or equal" descriptions that bidders are required to meet when such items are included in the solicitation.

(v) The acceptance, to the extent practicable and economically feasible, of products and services dimensioned in the metric system of measurement.

(vi) Preference, to the extent practicable and economically feasible, for products and services that conserve natural resources and protect the environment and are energy efficient.

(b) Positive efforts shall be made by recipients to utilize small businesses, minority-owned firms, and women's business enterprises, whenever possible. Recipients of Federal awards shall take all of the following steps to further this goal.

(1) Ensure that small businesses, minority-owned firms, and women's business enterprises are used to the fullest extent practicable.

(2) Make information on forthcoming opportunities available and arrange timeframes for purchases and contracts to encourage and facilitate participation by small businesses, minority-owned firms, and women's business enterprises.

(3) Consider in the contract process whether firms competing for larger contracts intend to subcontract with small businesses, minority-owned firms, and women's business enterprises.

(4) Encourage contracting with consortiums of small businesses, minority-owned firms and women's business enterprises when a contract is too large for one of these firms to handle individually.

(5) Use the services and assistance, as appropriate, of such organizations as the Small Business Administration and the Department of Commerce's Minority Business Development Agency in the solicitation and utilization of small businesses, minority-owned firms and women's business enterprises.

(c) The type of procuring instruments used (e.g., fixed price contracts, cost reimbursable contracts, purchase orders, and incentive contracts) shall be determined by the recipient but shall be appropriate for the particular procurement and for promoting the best interest of the program or project involved. The "cost-plus-a-percentage-of-cost" or "percentage of construction cost" methods of contracting shall not be used.

(d) Contracts shall be made only with responsible contractors who possess the potential ability to perform successfully under the terms and conditions of the proposed procurement. Consideration shall be given to such matters as contractor integrity, record of past performance, financial and technical resources or accessibility to other necessary resources. In certain circumstances, contracts with certain parties are restricted by agencies' implementation of E.O.s 12549 and 12689, "Debarment and Suspension."

(e) Recipients shall, on request, make available for the Federal awarding agency, pre-award review and procurement documents, such as request for proposals or invitations for bids, independent cost estimates, etc., when any of the following conditions apply.

(1) A recipient's procurement procedures or operation fails to comply with the procurement standards in the Federal awarding agency's implementation of this regulation.

(2) The procurement is expected to exceed the small purchase threshold fixed at 41 U.S.C. 403 (11) (currently \$25,000) and is to be awarded without competition or only one bid or offer is received in response to a solicitation.

(3) The procurement, which is expected to exceed the small purchase threshold, specifies a "brand name" product.

(4) The proposed award over the small purchase threshold is to be awarded to other than the apparent low bidder under a sealed bid procurement.

(5) A proposed contract modification changes the scope of a contract or increases the contract amount by more than the amount of the small purchase threshold.

§ 105-72.505 Cost and price analysis.

Some form of cost or price analysis shall be made and documented in the procurement files in connection with every procurement action. Price analysis may be accomplished in various ways, including the comparison of price quotations submitted, market prices and similar indicia, together with discounts. Cost analysis is the review and evaluation of each element of cost to determine reasonableness, allocability and allowability.

§ 105-72.506 Procurement records.

Procurement records and files for purchases in excess of the small purchase threshold shall include the following at a minimum:

- (a) Basis for contractor selection,
- (b) Justification for lack of competition when competitive bids or offers are not obtained, and
- (c) Basis for award cost or price.

§ 105-72.507 Contract administration.

A system for contract administration shall be maintained to ensure contractor conformance with the terms, conditions and specifications of the contract and to ensure adequate and timely follow up of all purchases. Recipients shall evaluate contractor performance and document, as appropriate, whether contractors have met the terms, conditions and specifications of the contract.

§ 105-72.508 Contract provisions.

The recipient shall include, in addition to provisions to define a sound and complete agreement, the following provisions in all contracts. The following

provisions shall also be applied to subcontracts.

(a) Contracts in excess of the small purchase threshold shall contain contractual provisions or conditions that allow for administrative, contractual, or legal remedies in instances in which a contractor violates or breaches the contract terms, and provide for such remedial actions as may be appropriate.

(b) All contracts in excess of the small purchase threshold shall contain suitable provisions for termination by the recipient, including the manner by which termination shall be effected and the basis for settlement. In addition, such contracts shall describe conditions under which the contract may be terminated for default as well as conditions where the contract may be terminated because of circumstances beyond the control of the contractor.

(c) Except as otherwise required by statute, an award that requires the contracting (or subcontracting) for construction or facility improvements shall provide for the recipient to follow its own requirements relating to bid guarantees, performance bonds, and payment bonds unless the construction contract or subcontract exceeds \$100,000. For those contracts or subcontracts exceeding \$100,000, the Federal awarding agency may accept the bonding policy and requirements of the recipient, provided the Federal awarding agency has made a determination that the Federal Government'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 shall, 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 statute of all persons supplying labor and material in the execution of the work provided for in the contract.

(4) Where bonds are required in the situations described herein, the bonds shall be obtained from companies holding certificates of authority as acceptable sureties pursuant to 31 CFR part 223, "Surety Companies Doing Business with the United States."

(d) All negotiated contracts (except those for less than the small purchase threshold) awarded by recipients shall include a provision to the effect that the recipient, the Federal awarding agency, the Comptroller General of the United States, or any of their duly authorized representatives, shall have access to any books, documents, papers and records of the contractor which are directly pertinent to a specific program for the purpose of making audits, examinations, excerpts and transcriptions.

(e) All contracts, including small purchases, awarded by recipients and their contractors shall contain the procurement provisions of appendix A to this part, as applicable.

Subpart 105-72.60—Post-Award Requirements/Reports and Records

§ 105-72.600 Purpose of reports and records.

Sections 105-72.601 through 105-72.603 set forth the procedures for monitoring and reporting on the recipient's financial and program performance and the necessary standard reporting forms. They also set forth record retention requirements.

§ 105-72.601 Monitoring and reporting program performance.

(a) Recipients are responsible for managing and monitoring each project, program, subaward, function or activity supported by the award. Recipients shall monitor subawards to ensure sub-

recipients have met the audit requirements as delineated in § 105-72.306.

(b) The Federal awarding agency shall prescribe the frequency with which the performance reports shall be submitted. Except as provided in paragraph (f) of this section, performance reports shall not be required more frequently than quarterly or, less frequently than annually. Annual reports shall be due 90 calendar days after the grant year; quarterly or semiannual reports shall be due 30 days after the reporting period. The Federal awarding agency may require annual reports before the anniversary dates of multiple year awards in lieu of these requirements. The final performance reports are due 90 calendar days after the expiration or termination of the award.

(c) If inappropriate, a final technical or performance report shall not be required after completion of the project.

(d) When required, performance reports shall generally contain, for each award, brief information on each of the following.

(1) A comparison of actual accomplishments with the goals and objectives established for the period, the findings of the investigator, or both. Whenever appropriate and the output of programs or projects can be readily quantified, such quantitative data should be related to cost data for computation of unit costs.

(2) Reasons why established goals were not met, if appropriate.

(3) Other pertinent information including, when appropriate, analysis and explanation of cost overruns or high unit costs.

(e) Recipients shall not be required to submit more than the original and two copies of performance reports.

(f) Recipients shall immediately notify the Federal awarding agency of developments that have a significant impact on the award-supported activities. Also, notification shall be given in the case of problems, delays, or adverse conditions which materially impair the ability to meet the objectives of the award. This notification shall include a statement of the action taken or contemplated, and any assistance needed to resolve the situation.

(g) Federal awarding agencies may make site visits, as needed.

(h) Federal awarding agencies shall comply with clearance requirements of 5 CFR part 1320 when requesting performance data from recipients.

§ 105-72.602 Financial reporting.

(a) The following forms or such other forms as may be approved by OMB are authorized for obtaining financial information from recipients.

(1) *SF-269 or SF-269A, Financial Status Report.* (i) Each Federal awarding agency shall require recipients to use the SF-269 or SF-269A to report the status of funds for all nonconstruction projects or programs. A Federal awarding agency may, however, have the option of not requiring the SF-269 or SF-269A when the SF-270, Request for Advance or Reimbursement, or SF-272, Report of Federal Cash Transactions, is determined to provide adequate information to meet its needs, except that a final SF-269 or SF-269A shall be required at the completion of the project when the SF-270 is used only for advances.

(ii) The Federal awarding agency shall prescribe whether the report shall be on a cash or accrual basis. If the Federal awarding agency requires accrual information and the recipient's accounting records are not normally kept on the accrual basis, the recipient shall not be required to convert its accounting system, but shall develop such accrual information through best estimates based on an analysis of the documentation on hand.

(iii) The Federal awarding agency shall determine the frequency of the Financial Status Report for each project or program, considering the size and complexity of the particular project or program. However, the report shall not be required more frequently than quarterly or less frequently than annually. A final report shall be required at the completion of the agreement.

(iv) The Federal awarding agency shall require recipients to submit the SF-269 or SF-269A (an original and no more than two copies) no later than 30 days after the end of each specified reporting period for quarterly and semi-annual reports, and 90 calendar days for annual and final reports. Extensions of reporting due dates may be ap-

proved by the Federal awarding agency upon request of the recipient.

(2) *SF-272, Report of Federal Cash Transactions.* (i) When funds are advanced to recipients the Federal awarding agency shall require each recipient to submit the SF-272 and, when necessary, its continuation sheet, SF-272a. The Federal awarding agency shall use this report to monitor cash advanced to recipients and to obtain disbursement information for each agreement with the recipients.

(ii) Federal awarding agencies may require forecasts of Federal cash requirements in the "Remarks" section of the report.

(iii) When practical and deemed necessary, Federal awarding agencies may require recipients to report in the "Remarks" section the amount of cash advances received in excess of three days. Recipients shall provide short narrative explanations of actions taken to reduce the excess balances.

(iv) Recipients shall be required to submit not more than the original and two copies of the SF-272, 15 calendar days following the end of each quarter. The Federal awarding agencies may require a monthly report from those recipients receiving advances totaling \$1 million or more per year.

(v) Federal awarding agencies may waive the requirement for submission of the SF-272 for any one of the following reasons:

(A) When monthly advances do not exceed \$25,000 per recipient, provided that such advances are monitored through other forms contained in this section;

(B) If, in the Federal awarding agency's opinion, the recipient's accounting controls are adequate to minimize excessive Federal advances; or,

(C) When the electronic payment mechanisms provide adequate data.

(b) When the Federal awarding agency needs additional information or more frequent reports, the following shall be observed.

(1) When additional information is needed to comply with legislative requirements, Federal awarding agencies shall issue instructions to require recipients to submit such information under the "Remarks" section of the reports.

(2) When a Federal awarding agency determines that a recipient's accounting system does not meet the standards in §105-72.301, additional pertinent information to further monitor awards may be obtained upon written notice to the recipient until such time as the system is brought up to standard. The Federal awarding agency, in obtaining this information, shall comply with report clearance requirements of 5 CFR part 1320.

(3) Federal awarding agencies are encouraged to shade out any line item on any report if not necessary.

(4) Federal awarding agencies may accept the identical information from the recipients in machine readable format or computer printouts or electronic outputs in lieu of prescribed formats.

(5) Federal awarding agencies may provide computer or electronic outputs to recipients when such expedites or contributes to the accuracy of reporting.

§105-72.603 Retention and access requirements for records.

(a) This section sets forth requirements for record retention and access to records for awards to recipients. Federal awarding agencies shall not impose any other record retention or access requirements upon recipients.

(b) Financial records, supporting documents, statistical records, and all other records pertinent to an award shall be retained for a period of three years from the date of submission of the final expenditure report or, for awards that are renewed quarterly or annually, from the date of the submission of the quarterly or annual financial report, as authorized by the Federal awarding agency. The only exceptions are the following.

(1) If any litigation, claim, or audit is started before the expiration of the 3-year period, the records shall be retained until all litigation, claims or audit findings involving the records have been resolved and final action taken.

(2) Records for real property and equipment acquired with Federal funds shall be retained for 3 years after final disposition.

(3) When records are transferred to or maintained by the Federal awarding agency, the 3-year retention requirement is not applicable to the recipient.

(4) Indirect cost rate proposals, cost allocations plans, etc., as specified in paragraph (g) of this section.

(c) Copies of original records may be substituted for the original records if authorized by the Federal awarding agency.

(d) The Federal awarding agency shall request transfer of certain records to its custody from recipients when it determines that the records possess long term retention value. However, in order to avoid duplicate recordkeeping, a Federal awarding agency may make arrangements for recipients to retain any records that are continuously needed for joint use.

(e) The Federal awarding agency, the Inspector General, Comptroller General of the United States, or any of their duly authorized representatives, have the right of timely and unrestricted access to any books, documents, papers, or other records of recipients that are pertinent to the awards, in order to make audits, examinations, excerpts, transcripts and copies of such documents. This right also includes timely and reasonable access to a recipient's personnel for the purpose of interview and discussion related to such documents. The rights of access in this paragraph are not limited to the required retention period, but shall last as long as records are retained.

(f) Unless required by statute, no Federal awarding agency shall place restrictions on recipients that limit public access to the records of recipients that are pertinent to an award, except when the Federal awarding agency can demonstrate that such records shall be kept confidential and would have been exempted from disclosure pursuant to the Freedom of Information Act (5 U.S.C. 552) if the records had belonged to the Federal awarding agency.

(g) Indirect cost rate proposals, cost allocations plans, etc. Paragraphs (g)(1) and (g)(2) apply to the following types of documents, and their supporting records: indirect cost rate computations or proposals, cost allocation

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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).

(1) If submitted for negotiation. If the recipient submits to the Federal awarding agency or the subrecipient submits to the recipient the proposal, plan, or other computation to form the basis for negotiation of the rate, then the 3-year retention period for its supporting records starts on the date of such submission.

(2) If not submitted for negotiation. If the recipient is not required to submit to the Federal awarding agency or the subrecipient is not required to submit to the recipient the proposal, plan, or other computation for negotiation purposes, then the 3-year retention period for the proposal, plan, or other computation and its supporting records starts at the end of the fiscal year (or other accounting period) covered by the proposal, plan, or other computation.

Subpart 105-72.70—Post-Award Requirements/Termination and Enforcement

§ 105-72.700 Purpose of termination and enforcement.

Section 105-72.701 and § 105-72.702 set forth uniform suspension, termination and enforcement procedures.

§ 105-72.701 Termination.

(a) Awards may be terminated in whole or in part only if paragraph (a)(1), (2) or (3) of this section apply.

(1) By the Federal awarding agency, if a recipient materially fails to comply with the terms and conditions of an award.

(2) By the Federal awarding agency with the consent of the recipient, 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.

(3) By the recipient upon sending to the Federal awarding agency written notification setting forth the reasons for such termination, the effective date, and, in the case of partial termi-

nation, the portion to be terminated. However, if the Federal awarding agency determines in the case of partial termination that the reduced or modified portion of the grant will not accomplish the purposes for which the grant was made, it may terminate the grant in its entirety under either paragraphs (a) (1) or (2).

(b) If costs are allowed under an award, the responsibilities of the recipient referred to in § 105-72.801(a), including those for property management as applicable, shall be considered in the termination of the award, and provision shall be made for continuing responsibilities of the recipient after termination, as appropriate.

§ 105-72.702 Enforcement.

(a) *Remedies for noncompliance.* If a recipient materially fails to comply with the terms and conditions of an award, whether stated in a Federal statute, regulation, assurance, application, or notice of award, the Federal awarding agency may, in addition to imposing any of the special conditions outlined in § 105-72.204, 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 recipient or more severe enforcement action by the Federal awarding agency.

(2) Disallow (that is, deny both use of funds and any applicable 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.

(4) Withhold further awards for the project or program.

(5) Take other remedies that may be legally available.

(b) *Hearings and appeals.* In taking an enforcement action, the awarding agency shall provide the recipient an opportunity for hearing, appeal, or other administrative proceeding to which the recipient is entitled under any statute or regulation applicable to the action involved.

(c) *Effects of suspension and termination.* Costs of a recipient resulting from obligations incurred by the recipient 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 recipient costs during suspension or after termination which are necessary and not reasonably avoidable are allowable if paragraph (c) (1) and (2) of this section apply.

(1) The costs result from obligations which were properly incurred by the recipient before the effective date of suspension or termination, are not in anticipation of it, and in the case of a termination, are noncancellable.

(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 a recipient from being subject to debarment and suspension under E.O.s 12549 and 12689 and the Federal awarding agency implementing regulations (see §105-72.203).

Subpart 105-72.80—After-the-Award Requirements

§ 105-72.800 Purpose.

Sections 105-72.801 through 105-72.803 contain closeout procedures and other procedures for subsequent disallowances and adjustments.

§ 105-72.801 Closeout procedures.

(a) Recipients shall submit, within 90 calendar days after the date of completion of the award, all financial, performance, and other reports as required by the terms and conditions of the award. The Federal awarding agency may approve extensions when requested by the recipient.

(b) Unless the Federal awarding agency authorizes an extension, a recipient shall liquidate all obligations incurred under the award not later than 90 calendar days after the funding period or the date of completion as specified in the terms and conditions of the award or in agency implementing instructions.

(c) The Federal awarding agency shall make prompt payments to a re-

ipient for allowable reimbursable costs under the award being closed out.

(d) The recipient shall promptly refund any balances of unobligated cash that the Federal awarding agency has advanced or paid and that is not authorized to be retained by the recipient for use in other projects. OMB Circular A-129 governs unreturned amounts that become delinquent debts.

(e) When authorized by the terms and conditions of the award, the Federal awarding agency shall make a settlement for any upward or downward adjustments to the Federal share of costs after closeout reports are received.

(f) The recipient shall account for any real and personal property acquired with Federal funds or received from the Federal Government in accordance with §105-72.401 through §105-72.407.

(g) In the event a final audit has not been performed prior to the closeout of an award, the Federal awarding agency shall retain the right to recover an appropriate amount after fully considering the recommendations on disallowed costs resulting from the final audit.

§ 105-72.802 Subsequent adjustments and continuing responsibilities.

(a) The closeout of an award does not affect any of the following.

(1) The right of the Federal awarding agency to disallow costs and recover funds on the basis of a later audit or other review.

(2) The obligation of the recipient to return any funds due as a result of later refunds, corrections, or other transactions.

(3) Audit requirements in §105-72.306.

(4) Property management requirements in §105-72.401 through §105-72.407.

(5) Records retention as required in §105-72.603.

(b) After closeout of an award, a relationship created under an award may be modified or ended in whole or in part with the consent of the Federal awarding agency and the recipient, provided the responsibilities of the recipient referred to in §105-72.803(a), including those for property management

as applicable, are considered and provisions made for continuing responsibilities of the recipient, as appropriate.

§ 105-72.803 Collection of amounts due.

(a) Any funds paid to a recipient in excess of the amount to which the recipient is finally determined to be entitled under the terms and conditions of the award constitute a debt to the Federal Government. If not paid within a reasonable period after the demand for payment, the Federal awarding agency may reduce the debt by paragraph (a) (1), (2) or (3) of this section.

(1) Making an administrative offset against other requests for reimbursements.

(2) Withholding advance payments otherwise due to the recipient.

(3) Taking other action permitted by statute.

(b) Except as otherwise provided by law, the Federal awarding agency shall charge interest on an overdue debt in accordance with 4 CFR Chapter II, Federal Claims Collection Standards.

APPENDIX A TO PART 105-72—CONTRACT PROVISIONS

All contracts, awarded by a recipient including small purchases, shall contain the following provisions as applicable:

1. *Equal Employment Opportunity*—All contracts shall contain a provision requiring compliance with E.O. 11246, "Equal Employment Opportunity," as amended by E.O. 11375, "Amending Executive Order 11246 Relating to Equal Employment Opportunity," and as supplemented by regulations at 41 CFR part 60, "Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor."

2. *Copeland "Anti-Kickback" Act (18 U.S.C. 874 and 40 U.S.C. 276c)*—All contracts and subgrants in excess of \$2000 for construction or repair awarded by recipients and subrecipients shall include a provision for compliance with the Copeland "Anti-Kickback" Act (18 U.S.C. 874), as supplemented by Department of Labor regulations (29 CFR part 3, "Contractors and Subcontractors on Public Building or Public Work Financed in Whole or in Part by Loans or Grants from the United States"). The Act provides that each contractor or subrecipient shall be prohibited from inducing, by any means, any person employed in the construction, completion, or repair of public work, to give up any part of the compensation to which he is otherwise entitled. The recipient shall report all sus-

pected or reported violations to the Federal awarding agency.

3. *Davis-Bacon Act, as amended (40 U.S.C. 276a to a-7)*—When required by Federal program legislation, all construction contracts awarded by the recipients and subrecipients of more than \$2000 shall include a provision for compliance with the Davis-Bacon Act (40 U.S.C. 276a to a-7) and as supplemented by Department of Labor regulations (29 CFR part 5, "Labor Standards Provisions Applicable to Contracts Governing Federally Financed and Assisted Construction"). Under this Act, contractors shall be required to pay wages to laborers and mechanics at a rate not less than the minimum wages specified in a wage determination made by the Secretary of Labor. In addition, contractors shall be required to pay wages not less than once a week. The recipient shall place a copy of the current prevailing wage determination issued by the Department of Labor in each solicitation and the award of a contract shall be conditioned upon the acceptance of the wage determination. The recipient shall report all suspected or reported violations to the Federal awarding agency.

4. *Contract Work Hours and Safety Standards Act (40 U.S.C. 327-333)*—Where applicable, all contracts awarded by recipients in excess of \$2000 for construction contracts and in excess of \$2500 for other contracts that involve the employment of mechanics or laborers shall include a provision for compliance with Sections 102 and 107 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 327-333), as supplemented by Department of Labor regulations (29 CFR part 5). Under Section 102 of the Act, each contractor shall be required to compute the wages of every mechanic and laborer on the basis of a standard work week of 40 hours. Work in excess of the standard work week is permissible provided that the worker is compensated at a rate of not less than 1½ times the basic rate of pay for all hours worked in excess of 40 hours in the work week. Section 107 of the Act is applicable to construction work and provides that no laborer or mechanic shall be required to work in surroundings or under working conditions which are unsanitary, hazardous or dangerous. These requirements do not apply to the purchases of supplies or materials or articles ordinarily available on the open market, or contracts for transportation or transmission of intelligence.

5. *Rights to Inventions Made Under a Contract or Agreement*—Contracts or agreements for the performance of experimental, developmental, or research work shall provide for the rights of the Federal Government and the recipient in any resulting invention in accordance with 37 CFR part 401, "Rights to Inventions Made by Nonprofit Organizations and Small Business Firms Under Government Grants, Contracts and Cooperative

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Agreements,” and any implementing regulations issued by the awarding agency.

6. *Clean Air Act (42 U.S.C. 7401 et seq.) and the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.), as amended*—Contracts and subgrants of amounts in excess of \$100,000 shall contain a provision that requires the recipient to agree to comply with all applicable standards, orders or regulations issued pursuant to the Clean Air Act (42 U.S.C. 7401 et seq.) and the Federal Water Pollution Control Act as amended (33 U.S.C. 1251 et seq.). Violations shall be reported to the Federal awarding agency and the Regional Office of the Environmental Protection Agency (EPA).

7. *Byrd Anti-Lobbying Amendment (31 U.S.C. 1352)*—Contractors who apply or bid for an award of \$100,000 or more shall file the required certification. Each tier certifies to the tier above that it will not and has not used Federal appropriated funds to pay any person or organization for influencing or attempting to influence an officer or employee of any agency, a member of Congress, officer or employee of Congress, or an employee of a member of Congress in connection with obtaining any Federal contract, grant or any other award covered by 31 U.S.C. 1352. Each tier shall also disclose any lobbying with non-Federal funds that takes place in connection with obtaining any Federal award. Such disclosures are forwarded from tier to tier up to the recipient.

8. *Debarment and Suspension (E.O.s 12549 and 12689)*—No contract shall be made to parties listed on the General Services Administration’s List of Parties Excluded from Federal Procurement or Nonprocurement Programs in accordance with E.O.s 12549 and

12689, “Debarment and Suspension.” This list contains the names of parties debarred, suspended, or otherwise excluded by agencies, and contractors declared ineligible under statutory or regulatory authority other than E.O. 12549. Contractors with awards that exceed the small purchase threshold shall provide the required certification regarding its exclusion status and that of its principal employees.

PART 105-735—STANDARDS OF CONDUCT

AUTHORITY: 5 U.S.C. 7301.

SOURCE: 61 FR 56403, Nov. 1, 1996, unless otherwise noted.

§ 105-735.1 Cross-references to employee ethical conduct standards, financial disclosure regulations, and other regulations.

Employees of the General Services Administration are subject to the executive branch-wide standards of ethical conduct at 5 CFR part 2635, GSA’s regulations at 5 CFR part 6701 which supplement the executive branch-wide standards, the regulations on employee responsibilities and conduct at 5 CFR part 735, and the executive branch financial disclosure regulations contained in 5 CFR part 2634, and GSA Order ADM 7900.9A, which can be obtained from the GSA Office of General Counsel.