

**§ 369.5**

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(4) The Community Reinvestment Act (CRA) ratings received by the bank, if any, under 12 U.S.C. 2901 *et seq.*;

(5) Economic conditions, including the level of loan demand, within the communities served by the covered interstate branches;

(6) The safe and sound operation and condition of the bank; and

(7) The FDIC's Community Reinvestment regulations (12 CFR Part 345) and interpretations of those regulations.

**§ 369.5 Sanctions.**

(a) *In general.* If the FDIC determines that a bank is not reasonably helping to meet the credit needs of the communities served by the bank in the host state, and that the bank's statewide loan-to-deposit ratio is less than 50 percent of the host state loan-to-deposit ratio, the FDIC:

(1) May order that a bank's covered interstate branch or branches be closed unless the bank provides reasonable assurances to the satisfaction of the FDIC, after an opportunity for public

comment, that the bank has an acceptable plan under which the bank will reasonably help to meet the credit needs of the communities served by the bank in the host state; and

(2) Will not permit the bank to open a new branch in the host state that would be considered to be a covered interstate branch unless the bank provides reasonable assurances to the satisfaction of the FDIC, after an opportunity for public comment, that the bank will reasonably help to meet the credit needs of the community that the new branch will serve.

(b) *Notice prior to closure of a covered interstate branch.* Before exercising the FDIC's authority to order the bank to close a covered interstate branch, the FDIC will issue to the bank a notice of the FDIC's intent to order the closure and will schedule a hearing within 60 days of issuing the notice.

(c) *Hearing.* The FDIC will conduct a hearing scheduled under paragraph (b) of this section in accordance with the provisions of 12 U.S.C. 1818(h) and 12 CFR part 308.

## CHAPTER IV—EXPORT-IMPORT BANK OF THE UNITED STATES

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## PART 400—EMPLOYEE FINANCIAL DISCLOSURE AND ETHICAL CONDUCT STANDARDS REGULATIONS

AUTHORITY: 5 U.S.C. 7301.

### § 400.101 Cross-reference to employee financial disclosure and ethical conduct standards regulations.

Employees of the Export-Import Bank of the United States (Bank) should refer to:

(a) The executive branch-wide financial disclosure regulations at 5 CFR part 2634;

(b) The executive branch-wide Standards of Ethical Conduct at 5 CFR part 2635; and

(c) The Bank regulations at 5 CFR part 6201 which supplement the executive branch-wide standards.

[60 FR 17628, Apr. 7, 1995]

## PART 403—CLASSIFICATION, DECLASSIFICATION, AND SAFEGUARDING OF NATIONAL SECURITY INFORMATION

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AUTHORITY: E.O. 12356, National Security Information, April 2, 1982 (3 CFR, 1982 Comp. p. 166) (hereafter referred to as the *Order*), Information Security Oversight Directive No. 1, June 25, 1982 (32 CFR part 2001) (hereafter referred to as the *Directive*), and National Security Decision Directive 84, "Safeguarding National Security Information," signed by the President on March 11, 1983 (hereafter referred to as *NSDD 84*).

SOURCE: 50 FR 27215, July 2, 1985, unless otherwise noted.

### § 403.1 General policies and definitions.

(a) This regulation of the Export-Import Bank (the Bank) implements exec-

utive orders which govern the classification, declassification, and safeguarding of national security information and material of the United States. This regulation is based on Executive Order 12356, National Security Information, April 2, 1982 (3 CFR, 1982 Comp. p. 166) (hereafter referred to as the *Order*), Information Security Oversight Directive No. 1, June 25, 1982 (32 CFR part 2001) (hereafter referred to as the *Directive*), and National Security Decision Directive 84, "Safeguarding National Security Information," signed by the President on March 11, 1983 (hereafter referred to as *NSDD 84*). Violation of the provisions of part 403 may result in the imposition of administrative penalties, and civil and criminal penalties under applicable law. Executive Order 12356 prescribes a uniform system for classifying, declassifying, and safeguarding national security information. It recognizes that it is essential that the public be informed concerning the activities of the Government, but that the interests of the United States and its citizens require that certain information concerning the national defense and foreign relations be protected against unauthorized disclosure. Information may not be classified under the Order unless its disclosure reasonably could be expected to cause damage to the national security.

(b) For the purposes of the Order, the Directive and these guidelines, the following terms shall have the meanings specified below:

(1) *Information* means any information or material, regardless of its physical form or characteristics, that is owned by, produced by or for, or is under the control of the United States Government.

(2) *National security information* means information that has been determined pursuant to this Order or any predecessor order to require protection against unauthorized disclosure and that is so designated.

(3) *Foreign government information* means: (i) Information provided by a foreign government or governments, an international organization of governments, or any element thereof with the expectation, expressed or implied, that

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the information, the source of the information, or both, are to be held in confidence; or

(ii) Information produced by the United States pursuant to or as a result of a joint arrangement with a foreign government or governments or an international organization of governments, or any element thereof, requiring that the information, the arrangement, or both, are to be held in confidence.

(4) *National security* means the national defense or foreign relations of the United States.

(5) *Confidential source* means any individual or organization that has provided, or that may reasonably be expected to provide, information to the United States on matters pertaining to the national security with the expectation, expressed or implied, that the information or relationship, or both, be held in confidence.

(6) *Original classification* means an initial determination that information requires, in the interest of national security, protection against unauthorized disclosure, together with a classification designation signifying the level of protection required.

### § 403.2 Responsibilities.

In the carrying out of security procedures, responsibility falls on all personnel generally and on certain personnel in a more particular manner.

(a) *Individual*. Each employee of the Bank having access to classified material has an individual responsibility to protect such information. Classified information should be secured in approved equipment or facilities whenever it is not under the direct control of the employee.

(b) *Office and Division Heads*. These officials have the additional responsibility of a continuing review for ascertaining that security procedures are properly observed by the personnel comprising their respective offices.

(c) *Security Officer*. (1) The Security Officer has the responsibility for developing, inspecting, and advising on procedures and controls for safeguarding classified material originating in, received by, in transit through, or in custody of the Bank; the training and orientation of employees; the carrying

out of inspections; and the destruction of obsolete and non-record material.

(2) The Security Officer shall be responsible for disseminating written material and conducting oral briefings to inform Bank personnel of the Order, Directive, and regulations. An explanation of the practical application of these procedures and the underlying policy objectives thereof shall be emphasized.

(d) *Security Committee*. (1) This Committee consists of the General Counsel, as Chairperson, the Security Officer, and other Bank employees, as designated by the President and Chairman (hereinafter referred to as the *Chairman*) and is responsible for the implementation and enforcement of the Order and the Directive. This Committee will act on all matters with respect to the Bank's administration of these regulations.

(2) All suggestions and complaints regarding the Bank's Information Security Program, including those regarding over-classification, failure to declassify, or delay in declassifying, not otherwise provided for herein, shall be referred to the Security Committee for review.

(3) The Security Committee shall have responsibility for recommending to the Chairman appropriate administrative action to correct abuse or violation of these regulations or of any provision of the Order or Directive thereunder, including but not limited to notification by warning letter, formal suspension without pay, and removal. Upon receipt of such a recommendation, the Chairman shall make a decision and advise the Security Committee of this action.

### § 403.3 Classification principles and authority.

(a) *Classification Principles*. (1) Except as provided in the Atomic Energy Act of 1954, as amended, the Order provides the only basis for classifying national security information. Information held by the Bank will be made available to the public to the extent possible consistent with the need to protect the national defense or foreign relations, as required by the interests of the United

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States and its citizens. Accordingly, security classification shall be applied only to protect the national security.

(2) Before a classification determination is made, each item of information that may require protection shall be identified exactly. This requires identification of that specific information, disclosure of which could affect the national security. When there is reasonable doubt about the need to classify, the information should be safeguarded as if it were confidential until a final determination is made by an authorized classifier as to its classification. The final determination must be made within thirty (30) days.

(b) *Classification Designations.* Information which requires protection against unauthorized disclosure in the interest of national security (*classified information*) shall be classified at one of the following three levels:

(1) TOP SECRET shall be applied only to information, the unauthorized disclosure of which reasonably could be expected to cause exceptionally grave damage to the national security.

(2) SECRET shall be applied only to information, the unauthorized disclosure of which reasonably could be expected to cause serious damage to the national security.

(3) CONFIDENTIAL shall be applied to information, the unauthorized disclosure of which reasonably could be expected to cause damage to the national security.

Except as provided by statute, no other terms, such as *SENSITIVE, OFFICIAL BUSINESS ONLY, AGENCY, BUSINESS, ADMINISTRATIVELY*, etc., shall be used within the Bank in conjunction with any of the three classification levels defined above.

(c) *Original Classification Authority and Criteria.* (1) The Bank's authority to assign original classification to any document is limited as follows and is nondelegable:

Classification	Classifier
CONFIDENTIAL	President and Chairman. First Vice President and Vice Chairman. General Counsel. Senior Vice Presidents. Security Officer.

(2) A determination to classify information shall be made by an original classification authority when the information concerns one or more of categories (i) through (x) of this paragraph, and when the unauthorized disclosure of the information, either by itself or in the context of other information, reasonably could be expected to cause damage to the national security. Information shall be considered for classification if it concerns:

(i) Military plans, weapons, or operations;

(ii) The vulnerabilities or capabilities of systems, installations, projects, or plans relating to the national security;

(iii) Foreign government information;

(iv) Intelligence activities (including special activities), or intelligence sources or methods;

(v) Foreign relations or foreign activities of the United States;

(vi) Scientific, technological, or economic matters relating to the national security;

(vii) United States Government programs for safeguarding nuclear materials or facilities;

(viii) Cryptology;

(ix) A confidential source; or

(x) Other categories of information that are related to the national security and that require protection against unauthorized disclosure as determined by the President of the United States, by the Chairman or by other officials who have been delegated original classification authority by the President. Recommendations concerning the need to designate additional categories of information that may be considered for classification shall be forwarded through the Security Officer to the Chairman for determination. Such a determination shall be reported to the Director of the Information Security Oversight Office.

(3) Information that is determined to concern one or more of the above categories shall be classified when an original classification authority also determines that its unauthorized disclosure, either by itself or in the context of other information, reasonably could be expected to cause damage to

the national security. Accordingly, certain information which would otherwise be unclassified may require classification when associated with other unclassified or classified information. Classification on this basis shall be supported by a written explanation that, at a minimum, shall be maintained with the file or reference on the recent copy of the information.

(4) Unauthorized disclosure of foreign government information, the identity of a confidential foreign source, or disclosure of intelligence sources or methods is presumed to cause damage to the national security.

(5) Information classified in accordance with the above classification categories shall not be declassified automatically as a result of any unofficial publication or inadvertent or unauthorized disclosure in the United States or abroad of identical or similar information.

(d) *Duration of Original Classification.*

(1) Information shall be classified as long as required by national security considerations. When it can be determined, a specific date or event for declassification shall be set by the original classification authority at the time the information is originally classified. If the date or event for declassification cannot be determined at the time of classification, the standard notation “Originating Agency’s Determination Required”, or its abbreviation “OADR”, should be entered on the “Declassify on” line.

(2) Automatic declassification determinations under predecessor orders shall remain valid unless the classification is extended by an authorized declassification authority. These extensions may be by individual documents or categories of information, provided, however, that any extension of classification on other than an individual document basis shall be reported to the Director of the Information Security Oversight Office. The declassification authority shall be responsible for notifying holders of the information of such extensions.

(3) Information classified under predecessor orders and marked for declassification review shall remain classified until reviewed for declassification under the provisions of the Order.

(e) *Marking and Identification.* (1) Classified information must be marked, or otherwise identified, to inform and warn the holder of the information of its sensitivity. The classifier is responsible for ensuring that proper classification markings are applied. At the time of classification, the following information shall be shown on the face of all classified documents, or clearly associated with other forms of classified information in a manner appropriate to the medium involved, unless this information itself would reveal a confidential source or relationship not otherwise evident in the document or information:

(i) One of the three classification levels defined in § 403.3(b); “(TS)” for Top Secret, “(S)” for Secret, “(C)” for Confidential, and “(U)” for Unclassified; with each page marked at top and bottom according to the highest level of classified information on each page.

(ii) The identity of the original classification authority if other than the person whose name appears as the approving or signing official;

(iii) The agency and office of origin; and

(iv) The date or event for declassification, or the notation “Originating Agency’s Determination Required.”

(2) Each classified document shall, by marking or other means, indicate which portions are classified, with the applicable classification level, and which portions are not classified. The Chairman may, for good cause, grant and revoke waivers of this requirement for specified classes of documents or information. The Director of the Information Security Oversight Office shall be notified of any waivers.

(3) Marking designations implementing the provisions of the Order, including abbreviations, shall conform to the standards prescribed in implementing directives issued by the Information Security Oversight Office. All authorized classifiers shall be issued a uniform stamp that has a “Classified by” line and a “Declassify on” line.

(4) Documents that contain foreign government information shall include either the marking, “FOREIGN GOVERNMENT INFORMATION”, or a marking that otherwise indicates that the information is foreign government

information. If that fact must be concealed, the document will be marked as if it were of U.S. origin. Foreign government information shall either retain its original classification or be assigned a United States classification that shall ensure a degree of protection at least equivalent to that required by the entity that furnished the information.

(5) Documents that contain information relating to intelligence sources or methods shall include the following marking unless proscribed by the Director of the Central Intelligence; WARNING NOTICE—INTELLIGENCE SOURCES OR METHODS INVOLVED.

(6) Information assigned a level of classification under predecessor orders shall be considered as classified at that level of classification despite the omission of other required markings. Omitted markings may be inserted on a document by the General Counsel or the Security Officer.

(f) *Limitations on Classification.* (1) In no case shall information be classified in order to conceal violations of law, inefficiency, or administrative error; to prevent embarrassment to a person, organization, or agency; to restrain competition; or to prevent or delay the release of information that does not require protection in the interest of national security.

(2) Basic scientific research information not clearly related to the national security may not be classified.

(3) The Chairman or other authorized original classifiers may reclassify information previously declassified and disclosed if it is determined in writing that—

(i) The information requires protection in the interest of national security, and

(ii) The information may reasonably be recovered.

In making such determination, the Chairman or any other authorized original classifier shall consider the following factors: The lapse of time following disclosure; the nature and extent of disclosure; the ability to bring the fact of reclassification to the attention of persons to whom the information was disclosed; the ability to prevent further disclosure; and the ability to retrieve the information vol-

untarily from persons not authorized access to its reclassified state. These reclassification actions shall be reported promptly to the Director of the Information Security Oversight Office.

(4) Information may be classified or reclassified after an agency has received a request for it under the Freedom of Information Act (5 U.S.C. 552) or the Privacy Act of 1974 (5 U.S.C. 552a), or the mandatory review provisions of the Order and these regulations, if such classification meets the requirements of the Order and is accomplished personally and on a document-by-document basis by the Chairman, the Vice Chairman, or the Security Officer.

#### § 403.4 Derivative classification.

(a) *Use of derivative classification.* (1) Unlike original classification which is an initial determination, derivative classification is an incorporation, paraphrasing, restatement, or generation in new form of information that is already classified. Derivative classification is the responsibility of those who only reproduce, extract, or summarize classified information, or who only apply classification markings derived from source material or as directed by a classification guide. Original classification authority is not required for derivative classification.

(2) Persons who apply such derivative classification markings shall:

(i) Respect original classification decisions;

(ii) Verify the information's current level of classification so far as practicable before applying the markings; and

(iii) Carry forward to any newly created documents the assigned dates or events for declassification or review. The latest date for declassification should be entered in the case of multiple source documents.

(b) *New Material.* (1) New material that derives its classification from information classified on or after the effective date of the Order, April 2, 1982, shall be marked with the declassification date or event, or the date for review, as assigned to the source information.

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(2) New material that derives its classification under prior orders shall be treated as follows:

(i) If the source material bears a classification date or event 20 years or less from the date or origin, that date or event shall be carried forward on the new material.

(ii) If the source material bears no declassification date or event or is marked for declassification beyond 20 years, the new material shall be marked with a date for review for declassification at 20 years from the date of original classification of the source material.

(iii) If the source material is foreign government information bearing no date or event for declassification or is marked for declassification beyond 30 years, the new material shall be marked for review for declassification at 30 years from the date of original classification of the source materials.

(iv) A copy of the source document or documents should be maintained with the file copy of the new document or documents which have been derivatively classified.

#### § 403.5 Declassification and downgrading.

(a) *Authority and policy for declassification and downgrading.* Information that continues to meet the classification requirements prescribed in § 403.3(c) despite the passage of time will continue to be safeguarded. However, information which is properly classified at the time it is developed may not necessarily require protection indefinitely. National security information over which the Bank exercises final classification jurisdiction shall be declassified or downgraded as soon as national security considerations permit. Information shall be declassified or downgraded by:

(1) The official who authorized the original classification, if that official is still serving in the same position, by a successor, or by a supervisory official of either; or

(2) Officials specifically delegated this authority in writing by the Chairman or by the Security Officer. A list of those who may be so delegated shall be maintained by the Security Officer.

(3) If the Director of the Information Security Oversight Office determines that information is unlawfully classified, the Director may require the Export-Import Bank to declassify it. Any such decision by the Director may be appealed to the National Security Council. The information shall remain classified until the appeal is decided.

(b) *Declassification Procedure.* Information marked with a specific declassification date or event shall be declassified on that date or upon occurrence of that event. The overall classification markings shall be lined through a statement placed on the cover or first page to indicate the declassification authority, by name and title, and the date of declassification. If practicable, the classification markings on each page shall be cancelled; otherwise, the statement on the cover or first page shall indicate that the declassification applies to the entire document.

(c) *Notification to Holders.* When classified information has been properly marked with specific dates or events for declassification it is not necessary to issue notices of declassification to any holders. However, when declassification action is taken earlier than originally scheduled, or the duration of classification is extended, the authority making such changes shall promptly notify all holders to whom the information was originally transmitted. This notification shall include the marking action to be taken, the authority for the change (name and title), and the effective date of the change. Upon receipt of notification, recipients shall make the proper changes and shall notify holders to whom they have transmitted the classified information.

(d) *Downgrading.* Information designated a particular level of classification may be assigned a lower classification level by the original classifier or by an official authorized to declassify the same information. Prompt notice of such downgrading shall be provided to known holders of the information. Classified information marked for automatic downgrading under previous Executive Orders shall be reviewed to determine that it no longer continues to meet classification requirements despite the passage of time.

(e) *Transferred Information.* Classified information transferred from one agency to another in conjunction with a transfer of functions, and not merely for storage purposes, shall be considered under the control of the receiving agency for purposes of downgrading and declassification, subject to consultation with any other agency that has an interest in the subject matter of the information. Prior to forwarding classified information to an approved storage facility of the Bank, to a Federal records center, or to the National Archives for permanent preservation, the information shall be reviewed for downgrading or declassification.

**§ 403.6 Systematic review for declassification.**

Classified information determined by the Archivist of the United States to be of sufficient value to warrant permanent retention will be subject to systematic declassification review by the Archivist in accordance with guidelines provided by the Bank, as originator of the information. These guidelines shall be developed by the Security Officer who is designated by the Bank to assist the Archivist in the review process. The guidelines shall be reviewed every five years or as requested by the Archivist of the United States.

**§ 403.7 Mandatory review for declassification.**

(a) Classified information under the jurisdiction of the Bank shall be reviewed for declassification upon receipt of a request by a United States citizen or permanent resident alien, a Federal agency, or a State or local government. A request for mandatory review of classified information shall be submitted in writing and describe the information with sufficient particularity to locate it with a reasonable amount of effort. Requests may be addressed to the:

General Counsel, Export-Import Bank of the U.S., 811 Vermont Avenue, NW., Washington, DC 20571

(b) The Bank's response to mandatory review requests will be governed by the amount of search and review time required to process the request. The Bank will acknowledge receipt of all requests, and will inform the re-

quester if additional time is needed to process the request. Except in unusual circumstances, the Bank will make a final determination within one year from the date of receipt of the request.

(c) When information cannot be declassified in its entirety, the Bank will make a reasonable effort to release, consistent with other applicable laws, those declassified portions that constitute a coherent segment.

(d) The bank shall determine whether information under the classification jurisdiction of the Bank or any reasonably segregable portion of it no longer requires protection. If so, the General Counsel shall promptly make such information available to the requester, and shall inform the requester of any fees due before releasing the document. If the information may not be released, in whole or in part, the General Counsel shall give the requester a brief statement of the reasons, and a notice, mailed with return receipt requested, of the right to appeal the determination within 60 days of the denial letter's receipt.

(e) The agency that initially received or classified records containing foreign government information shall be responsible for making a declassification determination on review requests for classified records which contain such foreign government information. Such requests shall be referred to the appropriate agency for action.

(f) When the Bank receives a mandatory declassification review request for records in its possession that were originated by another agency, it shall forward the request to that agency. The Bank may request notification of the declassification determination.

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

(h) The bank shall process requests for declassification that are submitted under the provisions of the Freedom of Information Act, as amended, or the

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Privacy Act of 1974, in accordance with the provisions of those acts. (*See*, 12 CFR part 404 and 12 CFR part 405, respectively.) In any case, however, exemptions under the Freedom of Information Act or other exemptions under applicable law may be invoked by the Bank to deny material on grounds other than classification.

(i) The Bank shall refuse to confirm or deny the existence or non-existence of requested information whenever the fact of its existence or non-existence is itself classifiable under the Order.

**§ 403.8 Appeals.**

(a) The Vice Chairman is designated to receive appeals on requests for declassification which have been denied by the Bank. Such appeals shall be addressed to:

First Vice President & Vice Chairman, Export-Import Bank of the United States, 811 Vermont Avenue NW., Washington, DC 20571

The appeal must be received within 60 days after receipt by appellant of the denial letter. Appeals shall be decided within 30 days of their receipt by the Vice Chairman.

(1) If the decision is to declassify the materials in their entirety, the Vice Chairman shall promptly make such information available to the requester, and inform the requester of any fees due before releasing the documents.

(2) If the decision is to deny declassification of a portion of the material, the Vice Chairman shall promptly make the part which was declassified available to the requester, and shall advise the requester, in writing, of the reasons for the partial denial of declassification.

(3) If the decision is to deny declassification of all the material, the Vice Chairman shall promptly advise the requester, in writing, of the reasons for such denial.

**§ 403.9 Fees.**

The following specific fees shall be applicable with respect to services rendered to members of the public under these regulations, by the Bank, except that the search fee will normally be waived when the search involves less than one-half hour of clerical time.

(a) Search for records, per hour or fraction thereof:	
(i) Professional .....	\$11.00
(ii) Clerical .....	6.00
(b) Computer service charges per second for actual use of computer central processing unit .....	.25
(c) Copies made by photostat or otherwise (per page); maximum of 5 copies will be provided .....	.10
(d) Certification of each record as a true copy .....	1.00
(e) Certification of each record as a true copy under official seal .....	1.50
(f) Duplication of architectural photographs and drawings .....	2.00

Fees must be paid in full prior to issuance of requested copies. Remittances shall be in the form either of a personal check or bank draft drawn on a bank in the United States, or postal money order. Remittances shall be made payable to the order of the Export-Import Bank of the United States, and mailed to:

General Counsel, Export-Import Bank of the United States, 811 Vermont Avenue NW., Washington, DC 20571

**§ 403.10 Safeguarding.**

(a) *General Access Requirements.* Except as provided in § 403.10(c), access to classified information shall be granted in accordance with the following:

(1) *Determination of Trustworthiness.* No person shall be given access to classified information or material unless a favorable determination has been made as to his trustworthiness. The determination of eligibility, referred to as a security clearance, shall be based on such investigations as the Bank may require in accordance with the standards and criteria of applicable law and Executive orders.

(2) *Determination of Need to Know.* In addition to a security clearance, a person must have a need for access to the particular classified information or material sought in connection with the performance of official duties or contractual obligations. The determination of that need shall be made by officials having responsibility for the classified information or material.

(b) *Classified Information Nondisclosure Agreement.* All persons with authorized access to classified information shall be required to sign a nondisclosure agreement, Standard Form 189, as a

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condition of access. This form shall be retained in the security file of the individual for 50 years.

(c) *Access by Historical Researchers and Former Presidential Appointees.* The Bank shall obtain written agreements from requesters to safeguard the information to which they are given access as permitted by the Order and written consent to the Bank's review of their notes and manuscripts for the purpose of determining that no classified information is contained therein. A determination of trustworthiness is a precondition to a requester's access. If the access requested by historical researchers and former Presidential Appointees requires the rendering of services for which fair and equitable fees may be charged pursuant to Title 5 of the Independent Offices Appropriations Act, 65 Stat. 290, 31 U.S.C. 483a (1976), the requester shall be so notified and the fees may be imposed.

(d) *Media Contacts.* All contacts by members of the media which concern classified information shall be directed to the attention of the Security Officer, Room 1031, Export-Import Bank of the United States, 811 Vermont Avenue NW., Washington, DC 20571.

(e) *Dissemination.* Except as otherwise provided by directives issued by the President through the National Security Council, classified information originating in another agency and in the possession of the Bank may not be disseminated outside the Bank without the consent of the originating agency.

(f) *Accountability Procedures.* Dissemination of various levels of classified information or material shall be within the control and responsibility of designated control officers. Particularly stringent controls shall be placed on information and material classified as TOP SECRET.

(1) *TOP SECRET.* Designated as TOP SECRET control officers are the Chairman, Vice Chairman and the Security Officer who alone have authority to receive TOP SECRET information for the Bank. Other personnel authorized in writing by the Chairman or Security Officer also may receive TOP SECRET information for the Bank. It shall be the responsibility of these individuals with respect to all TOP SECRET information:

(i) To receive the material for the Bank;

(ii) To maintain registers which will reflect the routing of the material and the return thereof in a reasonable length of time for security storage;

(iii) To dispatch and make record of material disseminated to authorized persons outside the Bank;

(iv) To make a physical inventory of all material at least annually; and

(v) To maintain current access records.

(2) *SECRET.* Designated as SECRET control officers are the Security Officer and the Analysis, Records & Communications Manager, who have the responsibility with respect to all information classified in this category:

(i) To receive the material for the Bank;

(ii) To maintain registers which will reflect the routing of the material and the return thereof in a reasonable length of time for security storage;

(iii) To dispatch and make record of material disseminated to authorized persons outside the Bank;

(iv) To maintain current access records.

(3) *CONFIDENTIAL.* Designated as CONFIDENTIAL control officers are the Security Officer and the Analysis, Records & Communications Manager who have responsibility with respect to all information classified in this category:

(i) To review material for the Bank;

(ii) To route the material to proper Bank offices;

(iii) To dispatch and make record of material disseminated to authorized persons outside the Bank;

(iv) To maintain current access records.

(g) *Storage.* Classified information shall be stored only in facilities or under conditions adequate to prevent unauthorized persons from gaining access to it and in accordance with the Directive as well as General Services Administration standards and specifications. Reference may be made to 32 CFR 2001.41, 2001.43 for preliminary guidance regarding these standards and specifications.

(h) *Coversheets.* Department of State (DSC) classified incoming cables are to

be logged in and routed to the appropriate offices in double envelopes. When these cables are being used in various offices, classified coversheets must be used to protect the documents. This practice eliminates the possibility of inadvertently mixing classified with non-classified material, and promotes security awareness. Coversheets are obtainable from the Office of the Security Director.

(i) *Transmittal.* (1) To be transmitted outside the Bank, all classified documents must be sent through the Security Office and have attached EIB Form 71-2, approved by one of the following: the President and Chairman, First Vice President and Vice Chairman, a Senior Vice President, General Counsel, Vice President or Security Officer.

(2) *Preparation and Receipting.* Classified information shall be enclosed in opaque inner and outer covers before transmitting. The inner cover shall be a sealed wrapper or envelope plainly marked with the assigned classification and addresses of both sender and addressee. Transmittal documents shall indicate on their face the highest level of any information transmitted, and must clearly state whether or not the transmittal document itself is classified after removal of enclosures and attachments. The outer cover shall be sealed and addressed with no identification of the classification of its contents. A receipt shall be attached to or enclosed in the inner cover, except that CONFIDENTIAL information shall require a receipt only if the sender deems it necessary. The receipt shall identify the sender, addressee, and the document but shall contain no classified information. It shall be immediately signed by the recipient and returned to the sender. Any of these wrapping and receipting requirements may be waived by agency heads under conditions that will provide adequate protection and prevent access by unauthorized persons.

(3) *Transmittal of CONFIDENTIAL information.* CONFIDENTIAL information shall be transmitted within and between the fifty States, the District of Columbia, the Commonwealth of Puerto Rico, and U.S. territories or possessions by one of the means estab-

lished for higher classifications, or by United States Postal Service, certified first class, or express mail service, when prescribed by an agency head. Outside these areas, CONFIDENTIAL information shall be transmitted only as is authorized for higher classification levels.

(4) Transmittal of TOP SECRET and SECRET information shall be in accordance with the Directive. Reference may be made to 32 CFR 2001.44 for preliminary guidance.

(j) *Destruction.* Classified information no longer needed in working files or for record or reference purposes shall be processed for appropriate disposition in accordance with Chapters 21 and 33 of title 44 U.S.C., when govern disposition of Federal Records. All classified information approved for destruction must be torn and placed in containers designated as burnbags which are available through the Office Services Section of the Bank. Destruction of such information will be carried out by the Security Officer or a designee by use of a disintegrator or by burning. The method of destruction selected must preclude recognition or reconstruction of the classified information or material. Records of destruction will be maintained by the Security Office for TOP SECRET information and material with serialized markings or material for which there is a special need to record its destruction.

(k) *Reproduction controls.* (1) Reproduction of classified documents is prohibited, except by personnel authorized in writing by the Chairman or Security Officer.

(2) TOP SECRET documents may not be reproduced without the consent of the originating agency unless otherwise marked by the originating office.

(3) Reproduction of SECRET and CONFIDENTIAL documents may be restricted by the originating agency.

(4) Reproduced copies of classified documents are subject to the same accountability and controls as the original documents.

(5) Records shall be maintained by the Security Officer to show the number and distribution or reproduced copies of all TOP SECRET documents, of all documents covered by special access programs distributed outside the

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originating agency, and all SECRET and all CONFIDENTIAL documents which are marked with special dissemination and reproduction limitations.

### § 403.11 Enforcement and investigation procedures.

(a) *Loss or Possible Compromise.* Any person who has knowledge of the loss or possible compromise of classified information shall immediately report the circumstances to the Security Officer of the Bank. In turn, the originating agency shall be notified about the loss or compromise in order that a damage assessment may be conducted and appropriate measures taken to negate or minimize any adverse effect, and prevent further such loss or compromise. An immediate inquiry shall be initiated by the Bank for the purposes: (1) Of determining cause and responsibility and (2) taking corrective measures and appropriate administrative, disciplinary, or legal action.

(b) *Reporting and Investigating Unauthorized Disclosures.* (1) Employees who have reason to believe that an unauthorized disclosure of classified information has occurred shall report the disclosure to their supervisor, who shall inform the Security Officer.

(2) The Bank shall promptly notify the Information Security Oversight Office at the General Services Administration, Washington, DC 20405, of all unauthorized disclosures of classified information.

(3) If the Bank believes that it is the source of an unauthorized disclosure of classified information that it originated, it shall evaluate the disclosure under paragraph (b)(7) of this section. If the disclosure is serious, the Bank shall report the disclosure and the results of the evaluation to the Department of Justice together with notification that it is conducting an internal investigation.

(4) If the Bank believes that it is the source of an unauthorized disclosure of classified information that it handled but did not originate, it shall report the disclosure to the Department of Justice and to the originating agency(ies) or department(s) for evaluation under paragraph (b)(7) of this section. If the Bank cannot determine the identity of the originating agency(ies) or

department(s), it shall report the disclosure to the Department of Justice together with any information or reasonable inferences as to the identity of the originating agency(ies) or department(s).

(5) If the Bank receives a request for an evaluation of information it originated, it shall, if the evaluation shows the disclosure was serious, inform the agency(ies) or department(s) from which the disclosure occurred of this conclusion and request that the agency(ies) or department(s) conduct an internal investigation.

(6) If the Bank determines that an unauthorized disclosure of classified information has occurred but that it neither originated, handled nor disclosed the information, it shall report the disclosure to the likely originating agency(ies) or department(s).

(7) In determining whether a disclosure is sufficiently serious to warrant reporting to the Department of Justice, the Bank, if it is the originating agency, shall ascertain the nature of the disclosed information, determine the extent to which it disseminated the information and evaluate the disclosure to determine whether it seriously damages its mission and responsibilities. In evaluating the damage caused by the disclosure, the Bank shall consider such matters as whether the disclosure jeopardizes an ongoing project, operation or source of information and to what extent the policy goals underlying the project or operation must be altered.

(8) In any instance where the Bank is determined to be the source of an unauthorized disclosure and an evaluation by the Bank or the originating agency(ies) or department(s) determines the disclosure to be of a serious nature, an internal investigation will be initiated and an investigation report, containing such information as may be required by the Department of Justice, will be submitted to the Department of Justice within 15 days after notification from the originating agency or Department of Justice, but in any case no later than 30 days. If the investigation report is not completed within 15 days, the Bank shall submit as much of the required information as is available at that time and furnish

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additional information as it is developed.

(9) Whenever the Bank determines during the course of an investigation that it is necessary to compel or induce the cooperation of an employee, the Bank shall first consult with the Department of Justice. The Department of Justice will coordinate with the Bank to determine the procedures the Bank may use to compel an employee's participation without foreclosing possible criminal proceedings.

(10) The Bank shall maintain records of all disclosures that have been reported or investigated.

(11) All employees shall cooperate fully with officials of the Bank or other agencies who are conducting investigations of unauthorized disclosures of classified information.

(12) Employees determined by the Bank to have knowingly participated in an unauthorized disclosure of classified information or who have refused to cooperate with an investigation of such a disclosure shall be denied further access to classified information and shall be subject to other appropriate administrative sanctions. Prior to taking action against an employee in connection with the unauthorized disclosure or classified information, the Bank shall consult with the Department of Justice, Criminal Division.

**PART 404—INFORMATION DISCLOSURE**

**Subpart A—Procedures for Disclosure of Records Under the Freedom of Information Act.**

- Sec.
- 404.1 General provisions.
- 404.2 Definitions.
- 404.3 Public reference facilities.
- 404.4 Request requirements.
- 404.5 Time for processing.
- 404.6 Release of records under the Freedom of Information Act.
- 404.7 Confidential business information.
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**Subpart B—Protection of Privacy and Access to Records Under the Privacy Act of 1974**

- 404.12 General provisions.
- 404.13 Definitions.
- 404.14 Requirements of request for access.
- 404.15 Initial determination.
- 404.16 Schedule of fees.
- 404.17 Appeal of denials of access.
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- 404.19 Request for accounting of record disclosures.
- 404.20 Notice of court-ordered and emergency disclosures.
- 404.21 Submission of social security and passport numbers.
- 404.22 Government contracts.
- 404.23 Other rights and services.

**Subparts C–E [Reserved]**

AUTHORITY: 5 U.S.C. 552 and 552a. Section 404.7 also issued under E.O. 12600, 52 F.R. 23781, 3 CFR, 1987 Comp., p. 235. Section 404.21 also issued under 5 U.S.C. 552a note.

SOURCE: 64 FR 14374, Mar. 25, 1999, unless otherwise noted.

**Subpart A—Procedures for Disclosure of Records Under the Freedom of Information Act.**

**§ 404.1 General provisions.**

(a) *Purpose.* This subpart establishes policy, procedures, requirements, and responsibilities for administration of the Freedom of Information Act (FOIA), 5 U.S.C. 552, at the Export-Import Bank of the United States (Ex-Im Bank).

(b) *Policy.* It is Ex-Im Bank's policy to honor all requests for the disclosure of its records, provided that disclosure would not adversely affect a legitimate public or private interest and would not impose an unreasonable burden on Ex-Im Bank. However, this subpart also recognizes that the soundness of many Ex-Im Bank programs depends upon the receipt of reliable commercial, technical, financial, and business information relating to applicants for Ex-Im Bank assistance and that receipt of such information depends on Ex-Im Bank's ability to hold such information in confidence. Consequently, except as provided by applicable law and this regulation, information provided

to Ex-Im Bank in confidence will not be disclosed without the submitter's consent.

(c) *Scope.* All record requests made to Ex-Im Bank shall be processed under this subpart, except that information customarily furnished to the public in the regular course of the performance of official duties may continue to be furnished to the public without complying with this subpart. Requests made by individuals under the Privacy Act of 1974 which are processed under subpart B of this part also shall be processed under this subpart A.

(d) *Ex-Im Bank Internet site.* Ex-Im Bank maintains an Internet site at <http://www.exim.gov>. The site contains information on Ex-Im Bank functions, activities, programs, and transactions. Web site visitors have access to Board of Directors and Loan Committee meeting minutes, country information, and Ex-Im Bank press releases, among other information. Ex-Im Bank encourages all prospective FOIA requesters to visit the site prior to submission of a FOIA request.

(e) *Delegation.* Any action or determination in this subpart which is the responsibility of a specific Ex-Im Bank employee, may be delegated to a duly designated alternate.

(f) *Ex-Im Bank address.* The Export-Import Bank of the United States is located at 811 Vermont Avenue, NW, Washington, DC 20571.

#### § 404.2 Definitions.

For purposes of this subpart, the following definitions shall apply:

*All other requesters*—Requesters other than commercial use requesters, educational and non-commercial scientific requesters, or representatives of the news media.

*Appeal*—A written request to the Ex-Im Bank Assistant General Counsel for Administration for reversal of an adverse initial determination.

*Business information*—Potentially confidential commercial or financial information that is provided to Ex-Im Bank.

*Business submitter*—Any person who provides business information to Ex-Im Bank.

*Commercial use request*—A request for a use or purpose that furthers the com-

mercial, trade or profit interest of the requester.

*Direct costs*—Expenditures incurred in the search, review, and duplication of records in response to a FOIA request.

*Educational institution*—A preschool, a public or private elementary or secondary school, an institution of undergraduate or graduate higher education, or an institution of professional or vocational education.

*Final determination*—The written decision by the Assistant General Counsel for Administration on an appeal.

*Initial determination*—The initial written determination by Ex-Im Bank regarding disclosure of requested records.

*Non-commercial scientific institution*—An institution that is operated for the purpose of conducting scientific research the results of which are not intended to promote any particular product or industry and that is not operated solely for purposes of furthering a business, trade or profit interest.

*Person*—An individual, partnership, corporation, association or organization other than a federal government agency.

*Record*—All papers, memoranda or other documentary material, or copies thereof, regardless of physical form or characteristics, created or received by Ex-Im Bank and preserved as evidence of the activities of Ex-Im Bank. "Record" does not include publications which are available to the public through the FEDERAL REGISTER, sale or free distribution.

*Redaction*—The process of removing non-disclosable material from a record so that the remainder may be released.

*Representative of the news media*—A person actively gathering information on behalf of an entity organized and operated to publish or broadcast news to the public. Freelance journalists shall qualify as representatives of the news media when they can demonstrate that a request is reasonably likely to lead to publication.

*Request*—Any record request made to Ex-Im Bank under the FOIA.

*Requester*—Any person making a request.

*Review*—The process of examining a record to determine whether any portion is required to be withheld. It includes redaction, duplication, and any

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other preparation for release. Review does not include time spent resolving general legal and policy issues regarding the application of exemptions.

*Search*—The process of identifying and collecting records pursuant to a request.

*Trade secrets*—All forms and types of financial, business, scientific, technical, economic or engineering information, including, but not limited to, patterns, plans, compilations, program devices, formulas, designs, prototypes, methods, techniques, processes, procedures, programs or codes.

*Unusual circumstances*—The need to search for and collect requested records from facilities that are separate from Ex-Im Bank headquarters; the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or the need for consultation with another agency a person that has a substantial interest in the determination of the request.

*Working days*—All calendar days excluding Saturdays, Sundays, and Federal Government holidays.

#### § 404.3 Public reference facilities.

Ex-Im Bank maintains a public reading room which contains the Ex-Im Bank records that the FOIA requires to be made available for public inspection and copying. The records available under this section include copies of records released pursuant to the FOIA that Ex-Im Bank determines have, or are likely to, become the subject of subsequent requests for substantially the same records. Requesters shall be responsible for the cost of duplicating such material in accordance with the provisions of § 404.9(e). Persons desiring to use the reading room should contact the Ex-Im Bank Freedom of Information and Privacy Office, either in writing at the address at § 404.1(f) or by telephone at (202) 565–3946 or (800) 565–3946, to arrange a time to inspect the available records.

#### § 404.4 Request requirements.

(a) *Form*. Requests must be made in writing and must be signed by, or on behalf of, the requester. Requests should be addressed to the Freedom of Information and Privacy Office at the

address in § 404.1(f) and should contain both the return address and telephone number of the requester.

(b) *Description of records requested*. Each request must describe the records sought in sufficient detail so as to enable a professional employee of Ex-Im Bank familiar with the subject matter of the request to locate the record with a reasonable amount of effort. A request shall not be deemed to have been received until such time as the request adequately identifies the records sought. To the extent practicable, a description should include relevant dates, format, subject matter, and the name of any person to whom the record is known to relate. A general request for records with no accompanying date restriction, either express or implied, shall be deemed to be a request for records created within the preceding twelve months.

(c) *Fee statement*. The request must contain a statement expressing willingness to pay fees for the requested records or a request for a fee waiver (see § 404.10) before the request shall be deemed to have been received. A fee statement may specify the maximum amount a requester is willing to pay for processing the request.

(1) Whenever a requester submits a FOIA request that does not contain a fee statement or a request for a fee waiver, Ex-Im Bank shall advise the requester of the requirements of this paragraph. If the requester fails to respond within ten working days of such notification, then the Freedom of Information and Privacy Office shall notify the requester, in writing, that Ex-Im Bank will not process the request.

(2) A general statement by the requester expressing willingness to pay all applicable fees under § 404.9 shall be deemed an agreement to pay up to \$50.00. If Ex-Im Bank estimates that the fees for a request will exceed \$50.00, then Ex-Im Bank shall offer the requester the opportunity to agree, in writing, either to pay a greater fee or to modify the request as a means of limiting the cost.

(d) *Written notice of amendment*. The requester should provide any amendment to the original request in writing to Ex-Im Bank.

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(e) *Requester assistance.* Ex-Im Bank shall make reasonable efforts to assist a requester in complying with the requirements of this section.

### § 404.5 Time for processing.

(a) *General.* Ex-Im Bank shall respond to requests within twenty working days of the date of receipt of the request unless unusual circumstances exist. Ex-Im Bank shall provide written notice to the requester whenever such unusual circumstances necessitate an extension. If the extension is expected to exceed ten working days, then Ex-Im Bank shall offer the requester the opportunity to:

- (1) Alter the request so that it may be processed within the time limit; or
- (2) Propose an alternative, feasible time frame for processing the request.

(b) *Date of receipt.* A request shall be deemed to have been received on the date that the request is received in the Freedom of Information and Privacy Office, provided that the requester has met all the requirements of § 404.4. Ex-Im Bank shall notify the requester of the date on which a request was officially received.

(c) *Order of processing.* Ex-Im Bank ordinarily shall process requests according to their order of receipt.

(d) *Expedited processing.* A request for expedited processing must be included in the original request for records and may be granted at the discretion of Ex-Im Bank based upon the requester's demonstration of:

- (1) An imminent threat to the life or physical safety of an individual; or
- (2) In the case of a requester who is a representative of the news media, an urgency to inform the public concerning actual or alleged Federal Government activity. Ex-Im Bank shall provide notice of its determination on expedited processing to the requester. A requester may file an administrative appeal, as set forth at § 404.11, based on a denial of a request for expedited processing. Ex-Im Bank shall grant expeditious consideration to any such appeal.

### § 404.6 Release of records under the Freedom of Information Act.

(a) *Creation of records.* A reasonable request for material not in existence may be honored at Ex-Im Bank's dis-

cretion when tabulation or compilation will not significantly burden Ex-Im Bank, its programs or its activities.

(b) *Discretionary release.* Consistent with federal government policy, material technically qualifying for exemption from disclosure under 5 U.S.C. 552(b)(5) may be made available when disclosure would not adversely affect legitimate public or private interests, violate law or impose an unreasonable burden on Ex-Im Bank. This policy does not, however, create any right enforceable in a court of law.

(c) *Segregable records.* Whenever it is determined that a portion of a record is exempt from disclosure, any reasonably segregable portion of the record shall be provided to the requester after redaction of the exempt material. If segregation would render the document meaningless, Ex-Im Bank shall withhold the entire record.

(d) *Date for determining responsive records.* Only those records within Ex-Im Bank's possession and control as of the date of receipt of a request shall be deemed to be responsive to a request.

### § 404.7 Confidential business information.

(a) *Scope.* This section applies to all business information, as defined in § 404.2. Such information shall only be disclosed pursuant to a FOIA request in accordance with this section.

(b) *Submitter designation.* All business submitters should designate, by appropriate markings, either at the time of submission or at a reasonable time thereafter, any portion of any submission that they consider to be exempt from disclosure under 5 U.S.C. 552(b)(4).

(c) *Pre-disclosure notice to the business submitter.* Whenever Ex-Im Bank receives a FOIA request seeking disclosure of business information, Ex-Im Bank shall provide prompt written notice to the submitter of such information. This notice shall include a description or a copy of the records containing the business information. Such notice shall not be required, however, if:

- (1) Ex-Im Bank determines that the records shall not be disclosed;
- (2) The records have been published or otherwise made available to the public; or

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(3) disclosure of the records is required by law.

(d) *Opportunity to object to disclosure.* The business submitter shall have ten working days from and including the date of the notification letter to provide Ex-Im Bank with a detailed statement of any objection to disclosure of the records. A submitter located outside the United States shall have twenty working days to object to disclosure. Ex-Im Bank may extend the time for objection upon timely request from the submitter and for good cause shown. A statement of objection must specify all grounds under the FOIA for withholding the information.

(e) *Notice to the requester.* The Freedom of Information and Privacy Office shall notify the requester in writing whenever a business submitter is afforded the opportunity to object to disclosure of records pursuant to paragraph (c) of this section.

(f) *Disclosure of confidential business information.* Ex-Im Bank shall consider any objections raised by the business submitter prior to making its disclosure decision.

(g) *Notice of intent to disclose.* Whenever Ex-Im Bank determines to disclose business information over the objection of a business submitter, Ex-Im Bank shall notify the business submitter, in writing, of such determination, the reasons for the decision, and the expected disclosure date. This notification—which shall be provided at least ten days prior to the planned disclosure date and which shall include a copy or description of the records at issue—is intended to afford the submitter the opportunity to seek judicial review.

(h) *Notice to requester of disclosure date.* If Ex-Im Bank determines to disclose records over a business submitter's objection, then Ex-Im Bank shall notify the requester of the expected disclosure date.

(i) *Appeal.* Whenever Ex-Im Bank determines to disclose, pursuant to an administrative appeal, business information that initially was withheld from disclosure under 5 U.S.C. 552(b)(4), Ex-Im Bank shall notify the business submitter. Such notice shall be in writing and shall be provided ten working days prior to the proposed disclosure

date. It shall include a copy or description of the records at issue and a statement of Ex-Im Bank's reasons for disclosure.

(j) *Notice of FOIA lawsuit.* Ex-Im Bank shall promptly notify the submitter whenever a requester brings suit against Ex-Im Bank seeking to compel the release of business information covered by this section. Ex-Im Bank shall promptly notify the requester when a submitter brings suit against Ex-Im seeking to restrict the release of business information that is covered by this section.

(k) *Exception.* Notwithstanding the foregoing provisions of this part, Ex-Im Bank may, upon request or on its own initiative, publicly disclose the parties to transactions for which Ex-Im Bank approves support, the amount of such support, the identity of any participants involved, a general description of the related U.S. exports, and the country to which such exports are destined.

### § 404.8 Initial determination.

(a) *Authority to grant or deny requests.* The Freedom of Information and Privacy Office shall be responsible for search, review, and the initial determination.

(b) *Referrals to other government agencies.* A requested record in Ex-Im Bank's possession that was created or classified by another Federal agency shall be referred to such agency for direct response to the requester. The Freedom of Information and Privacy Office shall notify the requester of any such referral, the number of documents so referred, and the name and address of each agency to which the request has been referred.

(c) *Notification of Ex-Im Bank action.* The Freedom of Information and Privacy Office shall notify the requester in writing of its decision to grant or deny the request.

(1) If the decision is made to grant a request, then Ex-Im Bank shall promptly disclose the requested records and shall inform the requester of any fee payable under § 404.9.

(2) A denial is a determination to withhold any requested record in whole or in part, a determination that a requested record does not exist or cannot be located or a determination that

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what has been requested is not a record subject to the FOIA. Whenever Ex-Im Bank withholds information, such notice shall include:

(i) The name, title, and signature of the person responsible for the determination;

(ii) The statutory basis for non-disclosure; and

(iii) A statement that any denial may be appealed under § 404.11 and a brief description of the requirements of that section.

(d) *Material withheld.* Ex-Im Bank shall make reasonable efforts to inform the requester of the volume of material withheld pursuant to a full or partial denial and the extent of any redaction. Ex-Im Bank shall not, however, indicate the extent of any denial when doing so could harm an interest protected by an applicable exemption.

### § 404.9 Schedule of fees.

(a) *General.* Ex-Im Bank shall charge fees to recover the full allowable direct costs it incurs in processing requests. Ex-Im Bank shall attempt to conduct searches in the most efficient manner to minimize costs for both Ex-Im Bank and the requester.

(b) *Categories of requesters.* Fees shall be assessed according to the status of the requester. The specific schedule of fees for each requester category (each as defined in § 404.2) is prescribed as follows:

(1) *Commercial use requesters.* Ex-Im Bank shall charge the full costs for search, review, and duplication.

(2) *Educational and non-commercial scientific institution requesters.* Ex-Im Bank shall charge only for the cost of duplication in excess of 100 pages. No fee will be charged for search or review.

(3) *Representatives of the news media.* Ex-Im Bank shall charge only for the cost of duplication in excess of 100 pages. No fee will be charged for search or review.

(4) *All other requesters.* Ex-Im Bank shall charge for the cost of search, review, and duplication, except that 100 pages of duplication and two hours of professional search time shall be furnished without charge.

(c) *Search and review fees.* Ex-Im Bank shall charge the following fees for search and review:

(1) *Clerical.* Hourly rate—\$16.00.

(2) *Professional.* Hourly rate—\$32.00.

(3) *Computer Searches.* Hourly rate—based upon the salary of the employee performing the work and the cost of operating any equipment.

(d) *Administrative appeals.* Ex-Im Bank shall not charge for administrative review of an exemption applied in an initial determination. Ex-Im Bank shall charge, however, for search and review pursuant to an administrative appeal if the appeal is based on a claim other than the application of an exemption in the initial determination.

(e) *Duplication.* Ex-Im Bank shall charge \$.10 per page for paper copy duplication. Ex-Im Bank shall charge the actual or estimated cost of copies prepared by computer, such as tape or printouts, or for other methods of duplication. When duplication charges are expected to exceed \$50.00, Ex-Im Bank shall seek the requester's consent to be responsible for the estimated charges unless a requester has already expressed a willingness to pay duplication fees in excess of \$50.00. Ex-Im Bank shall also offer the requester the opportunity to alter the request in order to reduce duplication costs.

(f) *Fees for searches that produce no records.* Fees shall be payable as provided in this section even though searches and review do not generate any disclosable records.

(g) *Aggregating requests.* A requester, or a group of requesters acting in concert, shall not file multiple requests, seeking portions of a record or similar or related records, in order to avoid payment of fees. Ex-Im Bank shall aggregate any such requests and charge as if the requests were a single request.

(h) *Special services charges.* Complying with requests for special services such as those listed in this paragraph is entirely at the discretion of Ex-Im Bank. Ex-Im Bank shall recover the full costs of providing such services to the extent that it elects to provide them.

(1) *Certifications.* Ex-Im Bank shall charge \$25.00 to certify the authenticity of any Ex-Im Bank record or any copy of such record.

(2) *Special shipping.* Ex-Im Bank may ship by special means (e.g., express mail) if the requester so desires, provided that the requester has paid or

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has expressly undertaken to pay all costs of such special services. Ex-Im Bank shall not charge for ordinary packaging and mailing.

(i) *Minimum fee.* Ex-Im Bank shall waive a final fee of \$5.00 or less.

(j) *Advance payment.* Whenever Ex-Im Bank estimates that the fees are likely to exceed \$250.00, Ex-Im Bank shall notify the requester of the likely cost and shall require an advance payment of an amount up to the full estimated charges.

(k) *Failure to pay fee.* Ex-Im Bank shall not process a request by a requester who has failed to pay a fee for a previous request unless and until such a requester had paid the full amount owed and also has paid, in advance, the total estimated charges for the new request. The administrative time limits for the new request—set forth in §404.5—shall begin to run only after Ex-Im Bank has received the payments described in this section.

#### § 404.10 Fee waivers or reductions.

(a) *General.* Upon request, Ex-Im Bank shall consider a discretionary fee waiver or reduction of the fees chargeable under §404.9.

(b) *Form of request for fee waiver.* Ex-Im Bank shall deny a request for a waiver or reduction of fees that does not clearly address each of the following:

(1) The proposed use of the records and whether the requester will derive income or other benefit from such use;

(2) An explanation of the reasons why the public will benefit from such use; and

(3) If specialized use of the records is contemplated, a statement of the requester's qualifications that are relevant to the specialized use.

(d) *Burden of proof.* In all cases, the requester has the burden of presenting sufficient evidence or information to justify the fee waiver or reduction. The requester may use the procedures set forth in §404.11 to appeal a denial of a fee waiver request.

(e) *Employee requests.* Fees of less than \$50.00 shall be waived in connection with any request by an employee, former employee, or applicant for employment, related to a grievance or

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complaint of discrimination against Ex-Im Bank.

#### § 404.11 Administrative appeal.

(a) *General.* Whenever a request for records, a fee waiver or expedited processing has been denied, the requester may appeal the denial within thirty days of the date of Ex-Im Bank's issuance of notice of such action. Any denial under this subpart must be appealed according to this section before a requester is eligible to seek judicial review.

(b) *Form.* Appeals must be made in writing and must be signed by the appellant. Appeals should be addressed to the Assistant General Counsel for Administration at the address at §404.1(f). Both the envelope and the appeal letter should be clearly marked in capital letters: "FREEDOM OF INFORMATION ACT APPEAL." Failure to properly mark or address the appeal may slow its processing. The letter should include:

(1) A copy of the denied request or a description of the records requested;

(2) The name and title of the Ex-Im Bank employee who denied the request;

(3) The date on which the request was denied;

(4) The Ex-Im Bank identification number assigned to the request; and

(5) The return address and telephone number of the appellant.

(c) *Processing schedule.* Appeals shall not be deemed to have been received until the Assistant General Counsel for Administration receives the appeal. Ex-Im Bank shall notify the requester of the date on which an appeal was officially received. The disposition of an appeal shall be made in writing within twenty working days after the date of receipt of an appeal. The Assistant General Counsel for Administration may extend the time for response an additional ten working days if unusual circumstances exist, provided that the Assistant General Counsel for Administration notifies the requester in writing.

(d) *Ex-Im Bank decision.* A final determination which affirms an adverse initial determination shall set forth the reasons for affirming the denial and shall advise the requester of the right to seek judicial review. If the initial

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determination is reversed on appeal, the request shall be remanded to the Freedom of Information and Privacy Office to be processed promptly in accordance with the decision on appeal, subject to § 404.7(i).

### Subpart B—Access to Records Under the Privacy Act of 1974

#### § 404.12 General provisions.

(a) *Purpose.* This subpart establishes policies, procedures, requirements, and responsibilities for administration of the Privacy Act of 1974, 5 U.S.C. 552a, at the Export-Import Bank of the United States (Ex-Im Bank).

(b) *Relationship to the Freedom of Information Act.* The Privacy Act applies to records contained in a systems of records, as defined in § 404.13. If an individual submits a request for access to records and cites the Privacy Act, but the records sought are not contained in a Privacy Act system of records, then the request shall be processed only under subpart A of this part, Procedures for Disclosure of Records Under the Freedom of Information Act. All requests properly processed under this subpart B shall also be processed under subpart A of this part.

(c) *Appellate authority.* The Ex-Im Bank Assistant General Counsel for Administration is the appellate authority for all Privacy Act requests.

(d) *Delegation.* Any action or determination in this subpart which is the responsibility of a specific Ex-Im Bank employee may be delegated to a duly designated alternate.

(e) *Ex-Im Bank address.* The Export-Import Bank of the United States is located at 811 Vermont Avenue, NW, Washington, DC 20571.

#### § 404.13 Definitions.

For purposes of this subpart, the following definitions shall apply:

*Appeal*—A written request to the Ex-Im Bank Assistant General Counsel for Administration for reversal of an adverse initial determination.

*Final determination*—The written decision by the Assistant General Counsel for Administration on an appeal.

*Individual*—A citizen of the United States or an alien lawfully admitted for permanent residence.

*Initial determination*—The initial written determination in response to a Privacy Act request.

*Record*—Any item, collection or grouping of information about an individual that is maintained within a system of records and that contains the individual's name or an identifying number, symbol or other identifying particular assigned to the individual.

*Redaction*—The process of removing non-disclosable material from a record so that the remainder may be released.

*Request for access*—A request to view a record.

*Request for accounting*—A request for a list of all disclosures of a record.

*Request for correction*—A request to modify a record.

*Requester*—An individual who makes a request under the Privacy Act.

*Review*—The process of examining a record to determine whether any portion is required to be withheld.

*Search*—The process of identifying and collecting records pursuant to a request.

*System of records*—A group of any records under the control of an agency from which information is retrieved by the name of the individual or some identifying number, symbol or other identifying particular assigned to the individual.

*Working days*—All calendar days excluding Saturdays, Sundays, and Federal Government holidays.

#### § 404.14 Requirements of request for access.

(a) *Form.* Requests for access must be made in writing and must be signed by the requester. Requests should be addressed to the Freedom of Information and Privacy Office at the address in § 404.12(e) and should contain both the return address and telephone number of the requester.

(b) *Description of records sought.* A request for access must describe the records sought in sufficient detail so as to enable Ex-Im Bank personnel to locate the system of records containing the records with a reasonable amount of effort. To the extent practicable, such description should include the nature of the record sought, the date of the record or the period in which the record was compiled, and the name or

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identifying number of the system of records in which the requester believes the record is kept. A requester may include his or her social security number in the request in order to facilitate the identification and location of the requested records.

(c) *Fee statement.* The request must contain a statement expressing willingness to pay fees for processing the request or a request for a fee waiver (see § 404.16(d)).

(1) Whenever a requester submits a request for access that does not contain a fee statement or a request for a fee waiver, Ex-Im Bank shall advise the requester of the requirements of this section. If the requester fails to respond within ten working days of such notification, then the Freedom of Information and Privacy Office shall notify the requester, in writing, that Ex-Im Bank will not process the request.

(2) A general statement by the requester expressing willingness to pay all applicable fees shall be deemed an agreement to pay up to \$25.00. If Ex-Im Bank estimates that the fees for a request will exceed \$25.00, then Ex-Im Bank shall notify the requester. Ex-Im Bank shall offer the requester the opportunity to agree, in writing, either to pay a greater fee or to modify the request as a means of limiting the cost.

(3) Whenever the estimated fee chargeable under this section exceeds \$25.00, Ex-Im Bank reserves the right to require a requester to make an advance payment prior to processing the request.

(4) Ex-Im Bank shall not process a request by a requester who has failed to pay a fee for a previous request unless and until such requester had paid the full amount owed and also has paid, in advance, the total estimated charges for the new request.

(d) *Verification of identity.* An individual who submits a request for access must verify his or her identity. The request must include the requesters full name, current address, and date and place of birth. In addition, such requester must provide a notarized statement attesting to his or her identity.

(e) *Verification of guardianship.* When a parent or guardian of a minor or the guardian of a person judicially determined to be incompetent submits a re-

quest for access to records that relate to the minor or incompetent, such parent or guardian must establish:

(1) His or her own identity and the identity of the subject of the record in accordance with paragraph (d) of this section; and

(2) Parentage or guardianship of the subject of the record, either by providing a copy of the subject's birth certificate showing parentage or by providing a court order establishing guardianship.

(f) *Written notice of amendment.* The requester must provide any amendment to the original request in writing to Ex-Im Bank.

(g) *Requester assistance.* Ex-Im Bank shall make reasonable efforts to assist a requester in complying with the requirements of this section.

(h) *Date of receipt.* Requests for access shall be deemed to have been received on the date that the request is received by the Freedom of Information and Privacy Office, provided that all the requirements of this section have been met. Ex-Im Bank shall notify the requester of the date on which it officially received a request.

**§ 404.15 Initial determination.**

(a) *Time for processing.* The Freedom of Information and Privacy Office shall respond to valid requests for access within twenty working days of the date of receipt of the request letter. The time for response may be extended an additional ten working days for good cause, provided that the Freedom of Information and Privacy Office notifies the requester in writing.

(b) *Notice regarding request for access.* The Freedom of Information and Privacy Office shall notify the requester in writing of its decision to grant or deny a request for access.

(1) If the request is granted, then the notice shall either include the requested records, in releasable form, or shall describe the manner in which access to the record will be granted. The notice also shall inform the requester of any processing fee.

(2) A denial is a determination to withhold any requested record in whole or in part or a determination that the

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requested record does not exist or cannot be located. If the request is denied, then the denial notice shall state:

(i) The name, signature, and title or position of the person responsible for the denial;

(ii) The reasons for the denial; and

(iii) The procedure for appeal of the denial under § 404.17 and a brief description of the requirements of that section.

(c) *Form of record disclosure.* Ex-Im Bank shall grant access to the requested records either by providing the requester with a copy of the record or, at the requester's option, by making the record available for inspection at a reasonable time and place. If Ex-Im Bank makes the record available for inspection, such inspection shall not unreasonably disrupt Ex-Im Bank operations. In addition, the requester must provide a form of official photographic identification—such as a passport, driver's license or identification badge—and any other form of identification bearing his or her name and address prior to inspection of the requested records. Records may be inspected by the requester in the presence of another individual, provided that the requester signs a form stating that Ex-Im Bank is authorized to disclose the record in the presence of both individuals.

### § 404.16 Schedule of fees.

(a) *Search and review.* Ex-Im Bank shall not charge for search and review.

(b) *Duplication.* Ex-Im Bank shall charge \$.10 per page for paper copy duplication. Ex-Im Bank shall charge the actual or estimated cost of copies prepared by computer, such as tape or printouts, or for other methods of reproduction or duplication.

(c) *Minimum fee.* Ex-Im Bank shall waive final fees of \$5.00 or less.

(d) *Fee waivers.* Ex-Im Bank may waive fees whenever it is determined to be in the public interest. Fees of less than \$50.00 shall be waived in connection with any request by an employee, former employee or applicant for employment, related to a grievance or complaint of discrimination against Ex-Im Bank.

(e) *Special services charges.* Complying with requests for special services such

as those listed in this paragraph is entirely at the discretion of Ex-Im Bank. Ex-Im Bank shall recover the full costs of providing such services to the extent that it elects to provide them.

(1) *Certifications.* Ex-Im Bank shall charge \$25.00 to certify the authenticity of any Ex-Im Bank record or any copy of such record.

(2) *Special shipping.* Ex-Im Bank may ship by special means (e.g., express mail) if the requester so desires, provided that the requester has paid or has expressly undertaken to pay all costs of such special services. Ex-Im Bank shall not charge for ordinary packaging and mailing.

### § 404.17 Appeal of denials of access.

(a) *Appeals to the Assistant General Counsel for Administration.* Whenever Ex-Im Bank denies a request for access or for waiver or reduction of fees, the requester may appeal the denial to the Assistant General Counsel for Administration within 30 working days of the date of Ex-Im Bank's issuance of notice of such action. Appeals must be made in writing and must be signed by the appellant. Appeals should be addressed to the Assistant General Counsel for Administration at the address in § 404.12(e). Both the envelope and the appeal letter should be clearly marked in capital letters: "PRIVACY ACT APPEAL." Failure to properly mark or address the appeal may slow its processing. An appeal shall not be deemed to have been received by Ex-Im Bank until the Assistant General Counsel for Administration receives the appeal letter. The letter should include:

(1) A copy of the denied request or a description of the records requested;

(2) The name and title of the Ex-Im Bank employee who denied the request;

(3) The date on which the request was denied; and

(4) The Ex-Im Bank identification number assigned to the request.

(b) *Final determination.* The disposition of an access appeal shall be made in writing within twenty working days after the date of receipt of the appeal. The Assistant General Counsel for Administration may extend the time for response an additional ten working days for good cause, provided that the

requester is notified in writing. A decision affirming the denial of a request for access shall include a brief statement of the reasons for affirming the denial and shall advise the requester of the right to seek judicial review. If the initial determination is reversed, then the request shall be remanded to the Freedom of Information and Privacy Office to be processed in accordance with the decision on appeal.

**§ 404.18 Requests for correction of records.**

(a) *Form.* Requests for correction must be made in writing and must be signed by the requester. Requests should be addressed to the Freedom of Information and Privacy Office at the address in § 404.12(e) and should contain both the return address and telephone number of the requester. The request must identify the particular record in question, state the correction sought, and set forth the justification for the correction. The requester also must verify his or her identity in accordance with the procedures set forth at § 404.14(d) and (e). Both the envelope and the request for correction itself should be clearly marked in capital letters: “PRIVACY ACT CORRECTION REQUEST.”

(b) *Initial determination.* The Freedom of Information and Privacy Office shall respond to valid correction requests within ten working days of receipt of the request letter. If Ex-Im Bank grants the request for correction, then the Freedom of Information and Privacy Office shall advise the requester of his or her right to obtain a copy, in releasable form, of the corrected record. A denial notice shall state the reasons for the denial and shall advise the requester of the right to appeal. Ex-Im Bank shall not charge for processing requests for correction.

(c) *Appeal of denial of request for correction.* Whenever Ex-Im Bank denies a request for correction, the requester may appeal the denial to the Assistant General Counsel for Administration within thirty working days of Ex-Im Bank’s issuance of notice of such action. Appeals must be made in writing and must be signed by the appellant. Appeals should be addressed to the Assistant General Counsel for Adminis-

tration at the address set forth in § 404.12(e). Both the envelope and the appeal letter should be clearly marked in capital letters: “PRIVACY ACT CORRECTION APPEAL.” Failure to properly mark or address the appeal may slow its processing. An appeal shall not be deemed to have been received by Ex-Im Bank until the Assistant General Counsel for Administration receives the appeal letter. The letter must include:

- (1) A copy of the denied request or a description of the correction sought;
- (2) The name and title of the Ex-Im Bank employee who denied the request;
- (3) The date on which the request was denied;
- (4) The Ex-Im Bank identification number assigned to the request; and
- (5) Any information said to justify the correction.

(d) *Final determination on correction appeal.* (1) The disposition of an appeal shall be made in writing within twenty working days after the date of receipt of an appeal. The Assistant General Counsel for Administration may extend the time for response an additional ten working days for good cause, provided that the requester is notified in writing.

(2) A decision affirming the denial of a request for access shall advise the appellant of the:

- (i) Reasons for affirming the denial;
- (ii) Right to seek judicial review; and
- (iii) Right to file a statement of disagreement, as provided in paragraph (e) of this section.

(3) If the initial determination is reversed, then the request shall be remanded to the Freedom of Information and Privacy Office to be processed in accordance with the decision on appeal.

(e) *Statement of disagreement.* Upon denial of a correction appeal, the appellant shall have the right to file a statement of disagreement with Ex-Im Bank, setting forth his or her reasons for disagreeing with the Agency’s action. The statement should be addressed to the Freedom of Information and Privacy Office at the address in § 404.12(e) and must be received within thirty working days of Ex-Im Bank’s issuance of the denial notice. A statement of disagreement must not exceed one typed page per fact disputed.

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Statements exceeding this limit shall be returned to the requester for editing. Upon receipt of a statement of disagreement under this section, the Freedom of Information and Privacy Office shall have the statement included in the system of records in which the disputed record is maintained and shall have the disputed record marked so as to indicate that a Statement of Disagreement has been filed. Ex-Im Bank may also append to the disputed record a written statement regarding Ex-Im Bank's reasons for denying the request to correct the record.

(f) *Notices of correction or disagreement.* In any disclosure of a record for which Ex-Im Bank has received a statement of disagreement, Ex-Im Bank shall clearly note any portion of the record which is disputed and shall provide a copy of the statement of disagreement. Ex-Im Bank also may provide its own statement regarding the disputed record. In addition, whenever Ex-Im Bank corrects a record or receives a statement of disagreement, Ex-Im Bank shall, as is reasonable under the circumstances, advise any person or agency to which it previously disclosed such record of the correction or statement, provided that an accounting of such disclosure exists.

### § 404.19 Request for accounting of record disclosures.

(a) *Required information.* With respect to each system of records under Ex-Im Bank control, Ex-Im Bank shall maintain an accurate accounting of the date, nature, and purpose of each external disclosure of a record and the name and address of all persons, organizations, and agencies to which disclosure has been made. Ex-Im Bank shall retain this accounting for at least five years or the life of the record, whichever is longer.

(b) *Form.* An individual may obtain an accounting of all disclosures of a record, provided that such individual establishes his or her identity as the subject of such record in accordance with the procedures set forth at § 404.14(d) and (e). A request for an accounting must be made in writing and must be signed by the requester. The request should be addressed to the Freedom of Information and Privacy

Office at the address in § 404.12(e) and should contain both the return address and telephone number of the requester. Both the envelope and the request itself should be clearly be marked in capital letters: "PRIVACY ACT ACCOUNTING REQUEST." Failure to properly mark or address the request may slow its processing. The request shall not be deemed to have been received by Ex-Im Bank until the Freedom of Information and Privacy Office receives the request. The letter must clearly identify the particular record for which the accounting is requested.

(c) *Initial determination.* The Freedom of Information and Privacy Office shall notify the requester whether the request will be granted or denied within ten working days of receipt of a valid request for an accounting. Ex-Im Bank shall not charge for processing such a request.

(d) *Exceptions.* Ex-Im Bank shall not be required to provide an accounting to an individual when the accounting relates to a disclosure made:

(1) To an employee within the agency;

(2) Under the FOIA; or

(3) To a law enforcement agency for an authorized law enforcement activity in response to a written request from such agency which specified the law enforcement activity for which the disclosure was sought.

### § 404.20 Notice of court-ordered and emergency disclosures.

(a) *Court-ordered disclosures.* When a record pertaining to an individual is required to be disclosed by a court order, the Assistant General Counsel for Administration shall make reasonable efforts to provide notice to the subject individual. Notice shall be given within a reasonable time after Ex-Im Bank's receipt of the order, except that in a case in which the order is not a matter of public record, notice shall be given only after the order becomes public. Such notice shall be mailed to the individual's last known address and shall contain a copy of the order and a description of the information disclosed.

(b) *Emergency disclosures.* If a record has been disclosed by Ex-Im Bank under compelling circumstances affecting the health or safety of any person,

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then, within ten working days, the Assistant General Counsel for Administration shall notify the subject individual of the disclosure at his or her last known address. The notice of such disclosure shall be in writing and shall state the:

- (1) Nature of the information disclosed;
- (2) Person, organization or agency to which it was disclosed;
- (3) Date of disclosure; and
- (4) Compelling circumstances justifying the disclosure.

**§ 404.21 Submission of social security and passport numbers.**

(a) *Policy.* Ex-Im Bank recognizes the importance of assessing, to the extent reasonably possible, the risks associated with transactions supported by Ex-Im Bank. It is often difficult to assess risks related to individuals and non-publicly traded entities. Therefore, when an individual or a non-publicly traded entity applies for participation in an Ex-Im Bank program or is proposed as a guarantor for an Ex-Im Bank transaction, Ex-Im Bank may request social security and/or U.S. passport numbers from such individual or from the principals of such entity. Ex-Im Bank shall not require submission of this information, and unwillingness or inability to provide a social security or passport number shall not affect Ex-Im Bank's decision on an application for Ex-Im Bank assistance.

(b) *Use.* Ex-Im Bank shall use social security and passport numbers to assess the creditworthiness of Ex-Im Bank program participants and as a mechanism for enforcing agreements with Ex-Im Bank. Such information shall not be disclosed, except as warranted by law and regulation.

(c) *Notice.* Whenever Ex-Im Bank requests a social security or passport number, Ex-Im Bank shall place an appropriate Privacy Act notification on the form used to collect the information.

**§ 404.22 Government contracts.**

(a) *Approval by Assistant General Counsel for Administration.* Ex-Im Bank shall not contract for the operation of a system of records or for an activity that requires access to a system of

records without the express, written approval of the Assistant General Counsel for Administration.

(b) *Contract clauses.* Any contract authorized under paragraph (a) of this section shall contain the standard contract clauses required by the Federal Acquisition Regulation (48 CFR 24.104) to ensure compliance with the requirements imposed by the Privacy Act. The division within Ex-Im Bank that is responsible for technical supervision of the contract shall be responsible for ensuring that the contractor complies with the Privacy Act contract requirements.

(c) *Contractor status.* Any contractor that operates an Ex-Im Bank system of records or engages in an activity that requires access to an Ex-Im Bank system of records shall be considered an Ex-Im Bank employee for purposes of this subpart. Ex-Im Bank shall supply any such contractor with a copy of the regulations in this subpart upon entering into a contract with Ex-Im Bank.

**§ 404.23 Other rights and services.**

Nothing in this subpart shall be construed to entitle any person to any service or to the disclosure of any record to which such person is not entitled under the Privacy Act.

**Subparts C-E [Reserved]**

**PART 405 [RESERVED]**

**PART 407—REGULATIONS GOVERNING PUBLIC OBSERVATION OF EX-IMBANK MEETINGS**

- Sec.
- 407.1 Purpose, scope and definitions.
- 407.2 Closing meetings.
- 407.3 Procedures applicable to regularly scheduled meetings.
- 407.4 Procedures applicable to other meetings.
- 407.5 Certification by General Counsel.
- 407.6 Transcripts, recordings and minutes of closed meetings.
- 407.7 Relationship to Freedom of Information Act.

AUTHORITY: Sec. (g) Government in the Sunshine Act, 5 U.S.C. 552b(g); secs. (b) through (f), 5 U.S.C. 552b.

SOURCE: 42 FR 12417, Mar. 4, 1977, unless otherwise noted.

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### § 407.1 Purpose, scope and definitions.

(a) Consistent with the principles that: (1) The public is entitled to the fullest practicable information regarding the decision-making processes of the Federal Government, and (2) the rights of individuals and the ability of the Export-Import Bank of the United States to carry out its statutory responsibilities should be protected, this part is promulgated pursuant to the directive of section (g) of the Government in the Sunshine Act, 5 U.S.C. 552b(g), and specifically implements sections (b) through (f) of said Act, 5 U.S.C. 552b (b) through (f).

(b) The term *meeting* means any meeting of the Board of Directors of Eximbank at which a quorum is present or any meeting of the Executive Committee of the Board of Directors where deliberations of the Board of Directors or the Executive Committee determine or result in the joint conduct or disposition of official Eximbank business.

(c) The term *regularly scheduled meeting* means meetings of the Board of Directors or the Executive Committee which are held at 9:00 a.m. on Thursday of each week.

(d) The term *General Counsel* means the General Counsel and his or her designees.

[42 FR 12417, Mar. 4, 1977, as amended at 47 FR 12136, Mar. 22, 1982; 49 FR 41237, Oct. 22, 1984]

### § 407.2 Closing meetings.

(a) Except where Eximbank finds that the public interest requires otherwise, a meeting, or any portion thereof, may be closed to the public, where the Board of Directors or the Executive Committee determines that such meetings, or any portion thereof, or information pertaining to such meeting, or any portion thereof, is likely to:

(1) Disclose matters that are: (i) Specifically authorized under criteria established by an Executive order to be kept secret in the interests of national defense or foreign policy and (ii) in fact properly classified pursuant to such Executive order;

(2) Relate solely to the internal personnel rules and practices of Eximbank or any other agency;

(3) Disclose matters specifically exempted from disclosure by statute (other than section 552 of title 5 U.S.C.), 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) Disclose trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) Involve accusing any person of a crime, or formally censuring any person;

(6) Disclose information of a personal nature where disclosure would constitute a clearly unwarranted invasion of personal privacy;

(7) Disclose investigatory records compiled for law enforcement purposes, or information which if written would be contained in such records, but only to the extent that the production of such records or information would:

(i) Interfere with enforcement proceedings,

(ii) Deprive a person of a right to a fair trial or an impartial adjudication,

(iii) Constitute an unwarranted invasion of personal privacy,

(iv) Disclose the identity of a confidential source and, in the case of a record 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, confidential information furnished only by the confidential source,

(v) Disclose investigative techniques and procedures, or

(vi) Endanger the life or physical safety of law enforcement personnel;

(8) Disclose information 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;

(9) Disclose information the premature disclosure of which would:

(i) In the case of an agency which regulates currencies, securities, commodities, or financial institutions, be

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likely to: (A) Lead to significant financial speculation in currencies, securities, or commodities, or (B) significantly endanger the stability of any financial institution; or

(ii) In the case of Eximbank or any other agency, be likely to significantly frustrate implementation of a proposed agency action;

except that paragraph (a)(9)(ii) of this section shall not apply in any instance where the agency has already disclosed to the public the content or nature of its proposed action, or where the agency is required by law to make such disclosure on its own initiative prior to taking final agency action on such proposal; or

(10) Specifically concern Eximbank's issuance of a subpoena, or Eximbank's participation in a civil action or proceeding, an action in a foreign court or international tribunal, or an arbitration.

(b) Inasmuch as opening any regularly scheduled meeting, or any portion thereof, to public observation will be likely to result in the disclosure of the kind of information set forth in paragraph (a) (4), (8), (9)(i) or (a)(10) of this section, or any combination thereof, of paragraph (a) of this section, the Board of Directors expects to close all regularly scheduled meetings to the public.

(c) Any other meeting of Eximbank, or any portion thereof, will be open to public observation except where the Board of Directors determines that such meeting, or any portion thereof, is likely to disclose information of the kind set forth in any paragraph of § 407.2(a). In the event that the Board of Directors closes such meeting, or any portion thereof, by virtue of paragraph (a)(4), (8), (9)(i)(A) or (a)(10) of this section, or any combination thereof, the procedure set forth in § 407.3 below will apply, and in the event that the Board of Directors closes such meeting, or any portion thereof, by virtue of any of the remaining paragraphs of § 407.2(a), or any combination thereof, the procedures set forth in § 407.4 will apply.

#### § 407.3 Procedures applicable to regularly scheduled meetings.

(a) *Announcements.* Regularly scheduled meetings of the Board of Directors or the Executive Committee will be

held at 9:00 a.m. every Thursday in the Board Room (Room 1141) of the Bank's headquarters. In the event that a regularly scheduled meeting is rescheduled, public announcement of the time, date and place of such meeting will be made at the earliest practicable time in the form of a notice posted in the Office of the Secretary. An agenda setting forth the subject matter of each regularly scheduled meeting will be made available in the Office of the Secretary (Room 935), telephone number (202) (566-8871) at the earliest practicable time, *Provided*, That individual items may be added to or deleted from any agenda at any time. Inquiries from the public regarding any regularly scheduled meeting shall be directed to the Office of the Secretary.

(b) *Voting.* At the beginning of each regularly scheduled meeting, the Board of Directors or the Executive Committee will vote by recorded vote on whether to close such meeting. No proxy vote will be permitted. A record of such vote indicating the vote of each Director will be posted in the Office of the Secretary immediately following the conclusion of such meeting.

[42 FR 12417, Mar. 4, 1977, as amended at 47 FR 12136, Mar. 22, 1982; 49 FR 9560, Mar. 14, 1984; 49 FR 41237, Oct. 22, 1984; 50 FR 8606, Mar. 4, 1985]

#### § 407.4 Procedures applicable to other meetings.

(a) *Amendments.* (1) For every meeting which is to be open to public observation or which is to be closed pursuant to any paragraph of § 407.2(a) other than paragraphs (a) (4), (8), (9)(i) or (10), or any combination thereof, public announcement will be made at least one week before the meeting of the time, place, and the agenda setting forth the subject matter of such meeting, and whether the meeting, or any portion thereof, is to be open or closed to the public.

(2) Inquiries from the public regarding any such meeting shall be directed to the Office of the Secretary.

(3) The one-week period for the announcement required by paragraph (a)(1) of this section may be reduced if the Board of Directors or the Executive Committee determines by a recorded vote that Eximbank business requires

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such meeting to be called at an earlier date. Public announcement of the time, place, and subject matter of such meeting, and whether open or closed to the public, will be made at the earliest practicable time.

(4) The time or place of a meeting may be changed following the announcement required by paragraph (a)(1) of this section only if public announcement is made of such change at the earliest practicable time.

(5) The subject matter of a meeting or the determination of the Board of Directors or the Executive Committee to open or close a meeting, or any portion thereof, to the public, may be changed following the announcement required by paragraph (a) of this section only if:

(i) A majority of the entire voting membership of the Board of Directors or the Executive Committee determines by a recorded vote that Eximbank business so requires and that no earlier announcement of the change was possible; and

(ii) The Board of Directors or the Executive Committee announces such change and the vote of each Director upon such change at the earliest practicable time.

(6) Individual items may be added to or deleted from any agenda at any time.

(7) The announcements required pursuant to this section shall be made in the form of a notice posted in the Office of the Secretary. In addition, immediately following each announcement required by this section, notice of: (i) The time, place and subject matter of a meeting which is to be open to public observation or which is to be closed pursuant to any section of § 407.2(a) other than paragraphs (a) (4), (8), (9)(i) or (10), or any combination thereof, (ii) the decision to open or close such meeting, or any portion thereof, or (iii) any change in any announcement previously made shall be submitted for publication in the FEDERAL REGISTER.

(8) The information required by this subsection shall be disclosed except to the extent that it is exempt from disclosure under any section of § 407.2(a).

(b) *Voting.* (1) Action to close a meeting, or any portion thereof, pursuant to

any section of § 407.2(a), other than paragraphs (a) (4), (8), (9)(i), or (10), or any combination thereof, shall be taken only when a majority of the entire voting membership of the Board of Directors or the Executive Committee votes to take such action.

(2) A separate vote of the Board of Directors or the Executive Committee shall be taken with respect to each meeting, or any portion thereof, which is proposed to be closed to the public pursuant to any section of § 407.2(a) other than paragraphs (a) (4), (8), (9)(i) or (10), or any combination thereof, or with respect to any information which is proposed to be withheld under any section of § 407.2(a), other than paragraphs (a) (4), (8), (9)(i) or (10), or any combination thereof.

(3) A single vote of the Board of Directors or the Executive Committee may be taken with respect to a series of meetings, or any portion thereof, which are proposed to be closed to the public pursuant to any paragraph of § 407.2(a), other than paragraphs (a) (4), (8), (9)(i) or (10), or combination thereof, or with respect to any information concerning such series of meetings, so long as each meeting in such series involves the same particular matters and is scheduled to be held no more than 30 days after the initial meeting in such series.

(4) Whenever any person whose interests may be directly affected by any portion of a meeting which is to be open to public observation submits a request in writing to the Office of the Secretary that the Board of Directors or the Executive Committee close such portion to the public under paragraph (a) (5), (6) or (7) of § 407.2, the Board of Directors or the Executive Committee, shall vote by recorded vote on whether to close such portion.

(5) No proxy vote will be permitted for any vote required under this section.

(6) A record of each vote indicating the vote of each Director pursuant to paragraphs (b) (1), (2), (3) or (4) of this section will be posted in the Office of the Secretary within one day after it has been taken, *Provided*, That if a meeting or portion thereof is to be

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closed, such record shall be accompanied by: (i) A full written explanation of the reasons for closing such meeting or portion thereof and (ii) a list of all persons expected to attend such meeting or portion thereof and their affiliation.

### § 407.5 Certification by General Counsel.

For every meeting closed pursuant to any paragraph of § 407.2(a), the General Counsel of Eximbank will be asked to certify prior to such meeting that in his or her opinion such meeting may properly be closed to the public, and to state which of the exemptions set forth in § 407.2(a) he or she has relied upon. A copy of such certification will be posted in the Office of the Secretary. The original certification together with a statement from the presiding officer of such meeting setting forth the time, date and place of such meeting and the persons present will be retained by Eximbank as part of the transcript, recording or minutes of such meeting described below.

### § 407.6 Transcripts, recordings and minutes of closed meetings.

Eximbank will maintain a complete transcript or electronic recording of the proceedings of every meeting or portion thereof closed to the public. *Provided, however,* That if any meeting or portion thereof is closed pursuant to paragraphs (8), (9)(i) or (10) of § 407.2(a), Eximbank may maintain a set of detailed minutes for such meetings in lieu of a transcript or electronic recording. The entire transcript, electronic recording or set of minutes of a meeting will be made promptly available to the public for inspection and copying in the Office of the Secretary. Copies of such transcript or minutes, as well as copies of the transcription of such recording disclosing the identity of each speaker, will be furnished to any person at the actual cost of duplication or transcription. However, Eximbank will not make available for inspection or copying the transcript, electronic recording or minutes of the discussions of any item on the agenda of such meeting which contains information of the kind described in § 407.2(a). Requests to inspect or to

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have copies made of any transcript, electronic recording or set of minutes of any meeting or item(s) on the agenda, thereof should be made in writing to the General Counsel and if possible, identify the time, date and place of such meeting and briefly describe the item(s) being sought. Eximbank will maintain a complete verbatim copy of the transcript, a complete electronic recording or a complete copy of the minutes of each meeting, or portion thereof, closed to the public for two years after such meeting or one year from the date of final action of the Board of Directors or the Executive Committee on all items on the agenda of such meeting, whichever occurs later.

### § 407.7 Relationship to Freedom of Information Act.

Nothing in this part expands or limits the present rights of any person under part 404, except that the exemptions contained in § 407.2 shall govern in the case of any request made pursuant to part 404 to copy or inspect the transcripts, recordings or minutes described in § 407.6.

## PART 408—PROCEDURES FOR COMPLIANCE WITH THE NATIONAL ENVIRONMENTAL POLICY ACT

### Subpart A—General

Sec.

- 408.1 Background.
- 408.2 Purpose.
- 408.3 Applicability.

### Subpart B—Eximbank Implementing Procedures

- 408.4 Early involvement in foreign activities for which Eximbank financing may be requested.
- 408.5 Ensuring environmental documents are actually considered in Agency decision-making.
- 408.6 Typical classes of action.
- 408.7 Environmental information.

AUTHORITY: National Environmental Policy Act of 1969; 42 U.S.C. 4321 *et seq.*

SOURCE: 44 FR 50811, Aug. 30, 1979, unless otherwise noted.

**Subpart A—General****§ 408.1 Background.**

(a) The National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. 4321 *et seq.*) establishes national policies and goals for the protection of the environment. Section 102(2) of NEPA contains certain procedural requirements directed toward the attainment of such goals. In particular, all Federal agencies are required to give appropriate consideration to the environmental effects of their proposed actions in their decision-making and to prepare detailed environmental statements on recommendations or reports on proposals for legislation and other major Federal Actions significantly affecting the quality of the human environment.

(b) Executive Order 11991 of May 24, 1977, directed the Council on Environmental Quality (CEQ) to issue regulations to implement the procedural provisions of NEPA (NEPA Regulations). Accordingly, CEQ issued final NEPA Regulations which are binding on all Federal agencies as of July 30, 1979 (40 CFR parts 1500 through 1508) on November 29, 1979. These Regulations provide that each Federal agency shall as necessary adopt implementing procedures to supplement the NEPA Regulations. Section 1507.3(b) of the NEPA Regulations identifies those sections of the NEPA Regulations which must be addressed in agency procedures.

**§ 408.2 Purpose.**

The purpose of this part is to establish procedures which supplement the NEPA Regulations and provide for the implementation of those provisions identified in § 1507.3(b) of the NEPA Regulations.

**§ 408.3 Applicability.**

Historically, virtually all financing provided by Eximbank has been in aid of U.S. exports which involve no effects on the quality of the environment within the United States, its territories or possessions. Eximbank has separate procedures for conducting environmental reviews where such reviews are required by E.O. 12114 (January 4, 1979) because of potential effects on the environment of global commons areas or on the environment of foreign

nations. The procedures set forth in this part apply to the relatively rare cases where Eximbank financing of U.S. exports may affect environmental quality in the United States, its territories or possessions.

**Subpart B—Eximbank Implementing Procedures****§ 408.4 Early involvement in foreign activities for which Eximbank financing may be requested.**

(a) Section 1501.2(d) of the NEPA Regulations requires agencies to provide for early involvement in actions which, while planned by private applicants or other non-Federal entities, require some form of Federal approval. Pursuant to the Export-Import Bank Act of 1945, as amended, Eximbank is asked to provide financing for transactions involving exports of U.S. goods and services for projects in foreign countries which are planned by non-U.S. entities (Transactions).

(b) To implement the requirements of § 1501.2(d) with respect to these Transactions, Eximbank:

(1) Will provide on a project-by-project basis to applicant seeking financing from Eximbank guidance as to the scope and level of environmental information to be used in evaluating a proposed Transaction where: (i) The proposed Eximbank financing would be a major action and (ii) a Transaction may significantly affect the quality of the human environment in the United States, its territories or possessions.

(2) Upon receipt of an application for Eximbank financing or notification that an application will be filed, will consult as required with other appropriate parties to initiate and coordinate the necessary environmental analyses.

These responsibilities will be performed by the General Counsel and the Engineers of Eximbank.

(c) To facilitate Eximbank review of Transactions for which positive determinations have been made under paragraphs (b)(1)(i) and (ii) of this section, applicants should:

(1) Consult with the Engineer as early as possible in the planning process for guidance on the scope and level of environmental information required

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to be submitted in support of their application;

(2) Conduct any studies which are deemed necessary and appropriate by Eximbank to determine the impact of the proposed action on the quality of the human environment;

(3) Consult with appropriate U.S. (Federal, regional, State and local) agencies and other potentially interested parties during preliminary planning stages to ensure that all environmental factors are identified;

(4) Submit applications for all U.S. (Federal, regional, State and local) approvals as early as possible in the planning process;

(5) Notify Eximbank as early as possible of all other applicable legal requirements for project completion so that all applicable Federal environmental reviews may be coordinated; and

(6) Notify Eximbank of all known parties potentially affected by or interested in the proposed action.

**§ 408.5 Ensuring environmental documents are actually considered in Agency decision-making.**

Section 1505.1 of the NEPA Regulations contains requirements to ensure adequate consideration of environmental documents in agency decision-making. To implement these requirements, Eximbank officials will:

(a) Consider all relevant environmental documents in evaluating applications for Eximbank financing;

(b) Ensure that all relevant environmental documents, comments and responses accompany the application through Eximbank's review processes;

(c) Consider only those alternatives encompassed by the range of alternatives discussed in the relevant environmental documents when evaluating an application which is the subject of an EIS.

Eximbank actions	Start of NEPA process	Completion of NEPA process	Key officials or offices required to consider environmental documents
Issuance of Preliminary Commitment (P.C.).	When application is received.	When the Board of Directors meets to consider application. The Board may notify applicant that environmental effects will be considered when final commitment is requested and request information on environmental matters.	Under § 408.4(b)(1) (i) and (ii), General Counsel to determine whether requested Eximbank financing is a major action and Engineer to determine whether proposed Transaction may significantly affect the quality of the human environment in the United States, its territories or possessions.
Issuance of Final Commitment.	When application is received.	When the Board of Directors meets to consider application.	(If no P.C. has been issued, key offices will make determinations mentioned above.) Engineer to collect, prepare or arrange for preparation of all environmental documents.

**§ 408.6 Typical classes of action.**

(a) Section 1507.3(c)(2) of the NEPA Regulations in conjunction with § 1508.4 thereof requires agencies to establish

three typical classes of action for similar treatment under NEPA. These typical classes of action are set forth below:

Actions normally requiring EIS's	Actions normally requiring assessments but not necessarily EIS's	Actions normally not requiring assessments or EIS's
None .....	Applications for Eximbank financing under the direct lending program in support of transactions for which determinations under § 408.4(b)(1) (i) and (ii) above may be affirmative.	Applications for Eximbank financing in the form of insurance or guarantees.

(b) Eximbank will independently determine whether an EIS or an environmental assessment is required where:

(1) A proposal for agency action is not covered by one of the typical classes of action above; or

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(2) For actions which are covered, the presence of extraordinary circumstances indicates that some other level of environmental review may be appropriate.

### § 408.7 Environmental information.

Interested persons may contact the General Counsel regarding Eximbank's compliance with NEPA.

## PART 410—ENFORCEMENT OF NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS OR ACTIVITIES CONDUCTED BY EXPORT-IMPORT BANK OF THE UNITED STATES

Sec.

- 410.101 Purpose.
- 410.102 Application.
- 410.103 Definitions.
- 410.104–410.109 [Reserved]
- 410.110 Self-evaluation.
- 410.111 Notice.
- 410.112–410.129 [Reserved]
- 410.130 General prohibitions against discrimination.
- 410.131–410.139 [Reserved]
- 410.140 Employment.
- 410.141–410.148 [Reserved]
- 410.149 Program accessibility: Discrimination prohibited.
- 410.150 Program accessibility: Existing facilities.
- 410.151 Program accessibility: New construction and alterations.
- 410.152–410.159 [Reserved]
- 410.160 Communications.
- 410.161–410.169 [Reserved]
- 410.170 Compliance procedures.
- 410.171–410.999 [Reserved]

AUTHORITY: 29 U.S.C. 794.

SOURCE: 51 FR 4575, 4579, Feb. 5, 1986, unless otherwise noted.

### § 410.101 Purpose.

This part effectuates section 119 of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, which amended section 504 of the Rehabilitation Act of 1973 to prohibit discrimination on the basis of handicap in programs or activities conducted by Executive agencies or the United States Postal Service.

### § 410.102 Application.

This part applies to all programs or activities conducted by the agency.

### § 410.103 Definitions.

For purposes of this part, the term—  
*Assistant Attorney General* means the Assistant Attorney General, Civil Rights Division, United States Department of Justice.

*Auxiliary aids* means services or devices that enable persons with impaired sensory, manual, or speaking skills to have an equal opportunity to participate in, and enjoy the benefits of, programs or activities conducted by the agency. For example, auxiliary aids useful for persons with impaired vision include readers, Brailled materials, audio recordings, telecommunications devices and other similar services and devices. Auxiliary aids useful for persons with impaired hearing include telephone handset amplifiers, telephones compatible with hearing aids, telecommunication devices for deaf persons (TDD's), interpreters, notetakers, written materials, and other similar services and devices.

*Complete complaint* means a written statement that contains the complainant's name and address and describes the agency's alleged discriminatory action in sufficient detail to inform the agency of the nature and date of the alleged violation of section 504. It shall be signed by the complainant or by someone authorized to do so on his or her behalf. Complaints filed on behalf of classes or third parties shall describe or identify (by name, if possible) the alleged victims of discrimination.

*Facility* means all or any portion of buildings, structures, equipment, roads, walks, parking lots, rolling stock or other conveyances, or other real or personal property.

*Handicapped person* means any person who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment.

As used in this definition, the phrase:

(1) *Physical or mental impairment* includes—

(i) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of

the following body systems: Neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine; or

(ii) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. The term *physical or mental impairment* includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, and drug addition and alcoholism.

(2) *Major life activities* includes functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(3) *Has a record of such an impairment* means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(4) *Is regarded as having an impairment* means—

(i) Has a physical or mental impairment that does not substantially limit major life activities but is treated by the agency as constituting such a limitation;

(ii) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

(iii) Has none of the impairments defined in paragraph (1) of this definition but is treated by the agency as having such an impairment.

*Qualified handicapped person* means—

(1) With respect to any agency program or activity under which a person is required to perform services or to achieve a level of accomplishment, a handicapped person who meets the essential eligibility requirements and who can achieve the purpose of the program or activity without modifications in the program or activity that the agency can demonstrate would result in a fundamental alteration in its nature; or

(2) With respect to any other program or activity, a handicapped person who meets the essential eligibility requirements for participation in, or receipt of benefits from, that program or activity.

(3) *Qualified handicapped person* is defined for purposes of employment in 29 CFR 1613.702(f), which is made applicable to this part by §410.140.

*Section 504* means section 504 of the Rehabilitation Act of 1973 (Pub. L. 93–112, 87 Stat. 394 (29 U.S.C. 794)), as amended by the Rehabilitation Act Amendments of 1974 (Pub. L. 93–516, 88 Stat. 1617), and the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978 (Pub. L. 95–602, 92 Stat. 2955). As used in this part, section 504 applies only to programs or activities conducted by Executive agencies and not to federally assisted programs.

[51 FR 4575, 4579, Feb. 5, 1986; 51 FR 7543, Mar. 5, 1986]

§§ 410.104–410.109 [Reserved]

§ 410.110 Self-evaluation.

(a) The agency shall, by April 9, 1987, evaluate its current policies and practices, and the effects thereof, that do not or may not meet the requirements of this part, and, to the extent modification of any such policies and practices is required, the agency shall proceed to make the necessary modifications.

(b) The agency shall provide an opportunity to interested persons, including handicapped persons or organizations representing handicapped persons, to participate in the self-evaluation process by submitting comments (both oral and written).

(c) The agency shall, until three years following the completion of the self-evaluation, maintain on file and make available for public inspections:

(1) A description of areas examined and any problems identified, and

(2) A description of any modifications made.

§ 410.111 Notice.

The agency shall make available to employees, applicants, participants, beneficiaries, and other interested persons such information regarding the

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provisions of this part and its applicability to the programs or activities conducted by the agency, and make such information available to them in such manner as the head of the agency finds necessary to apprise such persons of the protections against discrimination assured them by section 504 and this regulation.

### §§ 410.112–410.129 [Reserved]

#### § 410.130 General prohibitions against discrimination.

(a) No qualified handicapped person shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity conducted by the agency.

(b)(1) The agency, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of handicap—

(i) Deny a qualified handicapped person the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified handicapped person an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

(iii) Provide a qualified handicapped person with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;

(iv) Provide different or separate aid, benefits, or services to handicapped persons or to any class of handicapped persons than is provided to others unless such action is necessary to provide qualified handicapped persons with aid, benefits, or services that are as effective as those provided to others;

(v) Deny a qualified handicapped person the opportunity to participate as a member of planning or advisory boards; or

(vi) Otherwise limit a qualified handicapped person in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service.

(2) The agency may not deny a qualified handicapped person the opportunity to participate in programs or activities that are not separate or different, despite the existence of permissibly separate or different programs or activities.

(3) The agency may not, directly or through contractual or other arrangements, utilize criteria or methods of administration the purpose or effect of which would—

(i) Subject qualified handicapped persons to discrimination on the basis of handicap; or

(ii) Defeat or substantially impair accomplishment of the objectives of a program or activity with respect to handicapped persons.

(4) The agency may not, in determining the site or location of a facility, make selections the purpose or effect of which would—

(i) Exclude handicapped persons from, deny them the benefits of, or otherwise subject them to discrimination under any program or activity conducted by the agency; or

(ii) Defeat or substantially impair the accomplishment of the objectives of a program or activity with respect to handicapped persons.

(5) The agency, in the selection of procurement contractors, may not use criteria that subject qualified handicapped persons to discrimination on the basis of handicap.

(c) The exclusion of nonhandicapped persons from the benefits of a program limited by Federal statute or Executive order to handicapped persons or the exclusion of a specific class of handicapped persons from a program limited by Federal statute or Executive order to a different class of handicapped persons is not prohibited by this part.

(d) The agency shall administer programs and activities in the most integrated setting appropriate to the needs of qualified handicapped persons.

### §§ 410.131–410.139 [Reserved]

#### § 410.140 Employment.

No qualified handicapped person shall, on the basis of handicap, be subjected to discrimination in employment under any program or activity

conducted by the agency. The definitions, requirements, and procedures of section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791), as established by the Equal Employment Opportunity Commission in 29 CFR part 1613, shall apply to employment in federally conducted programs or activities.

§§ 410.141–410.148 [Reserved]

**§ 410.149 Program accessibility: Discrimination prohibited.**

Except as otherwise provided in § 410.150, no qualified handicapped person shall, because the agency's facilities are inaccessible to or unusable by handicapped persons, be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any program or activity conducted by the agency.

**§ 410.150 Program accessibility: Existing facilities.**

(a) *General.* The agency shall operate each program or activity so that the program or activity, when viewed in its entirety, is readily accessible to and usable by handicapped persons. This paragraph does not—

(1) Necessarily require the agency to make each of its existing facilities accessible to and usable by handicapped persons; or

(2) Require the agency to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. In those circumstances where agency personnel believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the agency has the burden of proving that compliance with § 410.150(a) would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the agency head or his or her designee after considering all agency resources available for use in the funding and operation of the conducted program or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action would result in such an alteration or

such burdens, the agency shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that handicapped persons receive the benefits and services of the program or activity.

(b) *Methods.* The agency may comply with the requirements of this section through such means as redesign of equipment, reassignment of services to accessible buildings, assignment of aides to beneficiaries, home visits, delivery of services at alternate accessible sites, alteration of existing facilities and construction of new facilities, use of accessible rolling stock, or any other methods that result in making its programs or activities readily accessible to and usable by handicapped persons. The agency is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with this section. The agency, in making alterations to existing buildings, shall meet accessibility requirements to the extent compelled by the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151 through 4157), and any regulations implementing it. In choosing among available methods for meeting the requirements of this section, the agency shall give priority to those methods that offer programs and activities to qualified handicapped persons in the most integrated setting appropriate.

(c) *Time period for compliance.* The agency shall comply with the obligations established under this section by June 6, 1986, except that where structural changes in facilities are undertaken, such changes shall be made by April 7, 1989, but in any event as expeditiously as possible.

(d) *Transition plan.* In the event that structural changes to facilities will be undertaken to achieve program accessibility, the agency shall develop, by October 7, 1986, a transition plan setting forth the steps necessary to complete such changes. The agency shall provide an opportunity to interested persons, including handicapped persons or organizations representing handicapped persons, to participate in the development of the transition plan by submitting comments (both oral and

written). A copy of the transition plan shall be made available for public inspection. The plan shall, at a minimum—

(1) Identify physical obstacles in the agency's facilities that limit the accessibility of its programs or activities to handicapped persons;

(2) Describe in detail the methods that will be used to make the facilities accessible;

(3) Specify the schedule for taking the steps necessary to achieve compliance with this section and, if the time period of the transition plan is longer than one year, identify steps that will be taken during each year of the transition period; and

(4) Indicate the official responsible for implementation of the plan.

[51 FR 4575, 4579, Feb. 5, 1986; 51 FR 7543, Mar. 5, 1986]

**§ 410.151 Program accessibility: New construction and alterations.**

Each building or part of a building that is constructed or altered by, on behalf of, or for the use of the agency shall be designed, constructed, or altered so as to be readily accessible to and usable by handicapped persons. The definitions, requirements, and standards of the Architectural Barriers Act (42 U.S.C. 4151 through 4157), as established in 41 CFR 101-19.600 to 101-19.607, apply to buildings covered by this section.

**§§ 410.152-410.159 [Reserved]**

**§ 410.160 Communications.**

(a) The agency shall take appropriate steps to ensure effective communication with applicants, participants, personnel of other Federal entities, and members of the public.

(1) The agency shall furnish appropriate auxiliary aids where necessary to afford a handicapped person an equal opportunity to participate in, and enjoy the benefits of, a program or activity conducted by the agency.

(i) In determining what type of auxiliary aid is necessary, the agency shall give primary consideration to the requests of the handicapped person.

(ii) The agency need not provide individually prescribed devices, readers for

personal use or study, or other devices of a personal nature.

(2) Where the agency communicates with applicants and beneficiaries by telephone, telecommunication devices for deaf persons (TDD's) or equally effective telecommunication systems shall be used.

(b) The agency shall ensure that interested persons, including persons with impaired vision or hearing, can obtain information as to the existence and location of accessible services, activities, and facilities.

(c) The agency shall provide signage at a primary entrance to each of its inaccessible facilities, directing users to a location at which they can obtain information about accessible facilities. The international symbol for accessibility shall be used at each primary entrance of an accessible facility.

(d) This section does not require the agency to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. In those circumstances where agency personnel believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the agency has the burden of proving that compliance with § 410.160 would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the agency head or his or her designee after considering all agency resources available for use in the funding and operation of the conducted program or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action required to comply with this section would result in such an alteration or such burdens, the agency shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that, to the maximum extent possible, handicapped persons receive the benefits and services of the program or activity.

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**§§ 410.161–410.169 [Reserved]**

**§ 410.170 Compliance procedures.**

(a) Except as provided in paragraph (b) of this section, this section applies to all allegations of discrimination on the basis of handicap in programs or activities conducted by the agency.

(b) The agency shall process complaints alleging violations of section 504 with respect to employment according to the procedures established by the Equal Employment Opportunity Commission in 29 CFR part 1613 pursuant to section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791).

(c) General Counsel, Export-Import Bank of the United States shall be responsible for coordinating implementation of this section. Complaints may be sent to General Counsel, Export-Import Bank of the United States, 811 Vermont Avenue, NW., Room 947, Washington, DC 20571.

(d) The agency shall accept and investigate all complete complaints for which it has jurisdiction. All complete complaints must be filed within 180 days of the alleged act of discrimination. The agency may extend this time period for good cause.

(e) If the agency receives a complaint over which it does not have jurisdiction, it shall promptly notify the complainant and shall make reasonable efforts to refer the complaint to the appropriate government entity.

(f) The agency shall notify the Architectural and Transportation Barriers Compliance Board upon receipt of any complaint alleging that a building or facility that is subject to the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151 through 4157), or section 502 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 792), is not readily accessible to and usable by handicapped persons.

(g) Within 180 days of the receipt of a complete complaint for which it has jurisdiction, the agency shall notify the complainant of the results of the investigation in a letter containing—

- (1) Findings of fact and conclusions of law;
- (2) A description of a remedy for each violation found;
- (3) A notice of the right to appeal.

(h) Appeals of the findings of fact and conclusions of law or remedies must be filed by the complainant within 90 days of receipt from the agency of the letter required by §410.170(g). The agency may extend this time for good cause.

(i) Timely appeals shall be accepted and processed by the head of the agency.

(j) The head of the agency shall notify the complainant of the results of the appeal within 60 days of the receipt of the request. If the head of the agency determines that additional information is needed from the complainant, he or she shall have 60 days from the date of receipt of the additional information to make his or her determination on the appeal.

(k) The time limits cited in paragraphs (g) and (j) of this section may be extended with the permission of the Assistant Attorney General.

(l) The agency may delegate its authority for conducting complaint investigations to other Federal agencies, except that the authority for making the final determination may not be delegated to another agency.

[51 FR 4575, 4579, Feb. 5, 1986, as amended at 51 FR 7543, Mar. 5, 1986]

**§§ 410.171–410.999 [Reserved]**

**PART 411—NEW RESTRICTIONS ON LOBBYING**

**Subpart A—General**

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- 411.100 Conditions on use of funds.
  - 411.105 Definitions.
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- 411.200 Agency and legislative liaison.
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### Subpart E—Exemptions

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APPENDIX A TO PART 411—CERTIFICATION REGARDING LOBBYING

APPENDIX B TO PART 411—DISCLOSURE FORM TO REPORT LOBBYING

AUTHORITY: Sec. 319, Pub. L. 101-121 (31 U.S.C. 1352); 5 U.S.C. 552a.

SOURCE: 55 FR 6737, 6747, Feb. 26, 1990, unless otherwise noted.

CROSS REFERENCE: See also Office of Management and Budget notice published at 54 FR 52306, Dec. 20, 1989.

### Subpart A—General

#### §411.100 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 para-

graph (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.

#### §411.105 Definitions.

For purposes of this part:

(a) *Agency*, as defined in 5 U.S.C. 552(f), includes Federal executive departments and agencies as well as independent regulatory commissions and Government corporations, as defined in 31 U.S.C. 9101(1).

(b) *Covered Federal action* means any of the following Federal actions:

- (1) The awarding of any Federal contract;
- (2) The making of any Federal grant;
- (3) The making of any Federal loan;
- (4) The entering into of any cooperative agreement; and,
- (5) The extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

Covered Federal action does not include receiving from an agency a commitment providing for the United States to insure or guarantee a loan. Loan guarantees and loan insurance are addressed independently within this part.

(c) *Federal contract* means an acquisition contract awarded by an agency,

including those subject to the Federal Acquisition Regulation (FAR), and any other acquisition contract for real or personal property or services not subject to the FAR.

(d) *Federal cooperative agreement* means a cooperative agreement entered into by an agency.

(e) *Federal grant* means an award of financial assistance in the form of money, or property in lieu of money, by the Federal Government or a direct appropriation made by law to any person. The term does not include technical assistance which provides services instead of money, or other assistance in the form of revenue sharing, loans, loan guarantees, loan insurance, interest subsidies, insurance, or direct United States cash assistance to an individual.

(f) *Federal loan* means a loan made by an agency. The term does not include loan guarantee or loan insurance.

(g) *Indian tribe* and *tribal organization* have the meaning provided in section 4 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450B). Alaskan Natives are included under the definitions of Indian tribes in that Act.

(h) *Influencing or attempting to influence* means making, with the intent to influence, any communication to or appearance before an officer or employee or any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with any covered Federal action.

(i) *Loan guarantee* and *loan insurance* means an agency's guarantee or insurance of a loan made by a person.

(j) *Local government* means a unit of government in a State and, if chartered, established, or otherwise recognized by a State for the performance of a governmental duty, including a local public authority, a special district, an intrastate district, a council of governments, a sponsor group representative organization, and any other instrumentality of a local government.

(k) *Officer or employee of an agency* includes the following individuals who are employed by an agency:

(1) An individual who is appointed to a position in the Government under

title 5, U.S. Code, including a position under a temporary appointment;

(2) A member of the uniformed services as defined in section 101(3), title 37, U.S. Code;

(3) A special Government employee as defined in section 202, title 18, U.S. Code; and,

(4) An individual who is a member of a Federal advisory committee, as defined by the Federal Advisory Committee Act, title 5, U.S. Code appendix 2.

(l) *Person* means an individual, corporation, company, association, authority, firm, partnership, society, State, and local government, regardless of whether such entity is operated for profit or not for profit. This term excludes an Indian tribe, tribal organization, or any other Indian organization with respect to expenditures specifically permitted by other Federal law.

(m) *Reasonable compensation* means, with respect to a regularly employed officer or employee of any person, compensation that is consistent with the normal compensation for such officer or employee for work that is not furnished to, not funded by, or not furnished in cooperation with the Federal Government.

(n) *Reasonable payment* means, with respect to 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

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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.

### §411.110 Certification and disclosure.

(a) Each person shall file a certification, and a disclosure form, if required, with each submission that initiates agency consideration of such person for:

(1) Award of a Federal contract, grant, or cooperative agreement exceeding \$100,000; or

(2) An award of a Federal loan or a commitment providing for the United States to insure or guarantee a loan exceeding \$150,000.

(b) Each person shall file a certification, and a disclosure form, if required, upon receipt by such person of:

(1) A Federal contract, grant, or cooperative agreement exceeding \$100,000; or

(2) A Federal loan or a commitment providing for the United States to insure or guarantee a loan exceeding \$150,000.

Unless such person previously filed a certification, and a disclosure form, if required, under paragraph (a) of this section.

(c) Each person shall file a disclosure form at the end of each calendar quarter in which there occurs any event that requires disclosure or that materially affects the accuracy of the information contained in any disclosure form previously filed by such person under 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

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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

#### § 411.200 Agency and legislative liaison.

(a) The prohibition on the use of appropriated funds, in § 411.100 (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:

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(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 Pub. L. 95-507 and other subsequent amendments.

(e) Only those activities expressly authorized by this section are allowable under this section.

#### § 411.205 Professional and technical services.

(a) The prohibition on the use of appropriated funds, in § 411.100 (a), does not apply in the case of a payment of reasonable compensation made to an officer or employee of a person requesting or receiving a Federal contract, grant, loan, or cooperative agreement or an extension, continuation, renewal, amendment, or modification of a Federal contract, grant, loan, or cooperative agreement if payment is for professional or technical services rendered directly in the preparation, submission, or negotiation of any bid, proposal, or application for that Federal contract, grant, loan, or cooperative agreement or for meeting requirements imposed by or pursuant to law as a condition for receiving that Federal contract, grant, loan, or cooperative agreement.

(b) For purposes of paragraph (a) of this section, *professional and technical services* shall be limited to advice and analysis directly applying any professional or technical discipline. For example, drafting of a legal document accompanying a bid or proposal by a lawyer is allowable. Similarly, technical advice provided by an engineer on the performance or operational capability of a piece of equipment rendered directly in the negotiation of a contract is allowable. However, communications with the intent to influence made by a professional (such as a licensed lawyer) or a technical person (such as a licensed accountant) are not allowable

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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.

### §411.210 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

#### §411.300 Professional and technical services.

(a) The prohibition on the use of appropriated funds, in §411.100 (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 appli-

cation 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 §411.110 (a) and (b) regarding filing a disclosure form by each person, if required, shall not apply with respect to professional or technical services rendered directly in the preparation, submission, or negotiation of any commitment providing for the United States to insure or guarantee a loan.

(c) For purposes of paragraph (a) of this section, *professional and technical services* shall be limited to advice and analysis directly applying any professional or technical discipline. For example, drafting or a legal document accompanying a bid or proposal by a lawyer is allowable. Similarly, technical advice provided by an engineer on the performance or operational capability of a piece of equipment rendered directly in the negotiation of a contract is allowable. However, communications with the intent to influence made by a professional (such as a licensed lawyer) or a technical person (such as a licensed accountant) are not allowable under this section unless they provide advice and analysis directly applying their professional or technical expertise and unless the advice or analysis is rendered directly and solely in the preparation, submission or negotiation of a covered Federal action. Thus, for example, communications with the intent to influence made by a lawyer that do not provide legal advice or analysis directly and solely related to the legal aspects of his or her client's proposal, but generally advocate one proposal over another are not allowable under this section because the lawyer is not providing professional legal services. Similarly, communications with the intent to influence made by an engineer providing an engineering analysis prior to the preparation or submission of a bid or proposal are not allowable under this section since the engineer is providing technical services but not directly in the preparation, submission or negotiation of a covered Federal action.

## § 411.400

(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

#### § 411.400 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 paragraph (a) or (b) of this section shall be subject to a civil penalty of \$10,000, absent ag-

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gravating 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.

#### § 411.405 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.

#### § 411.410 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

#### § 411.500 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

#### § 411.600 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.

#### § 411.605 Inspector General report.

(a) The Inspector General, or other official as specified in paragraph (b) of this section, of each agency shall prepare and submit to Congress each year, commencing with submission of the President's Budget in 1991, an evaluation of the compliance of that agency with, and the effectiveness of, the requirements herein. The evaluation may include any recommended changes that may be necessary to strengthen or improve the requirements.

(b) In the case of an agency that does not have an Inspector General, the agency official comparable to an Inspector General shall prepare and submit the annual report, or, if there is no such comparable official, the head of the agency shall prepare and submit the annual report.

(c) The annual report shall be submitted at the same time the agency submits its annual budget justifications to Congress.

(d) The annual report shall include the following: All alleged violations relating to the agency's covered Federal actions during the year covered by the report, the actions taken by the head of the agency in the year covered by the report with respect to those alleged violations and alleged violations in previous years, and the amounts of civil penalties imposed by the agency in the year covered by the report.

#### APPENDIX A TO PART 411— 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

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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,

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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.

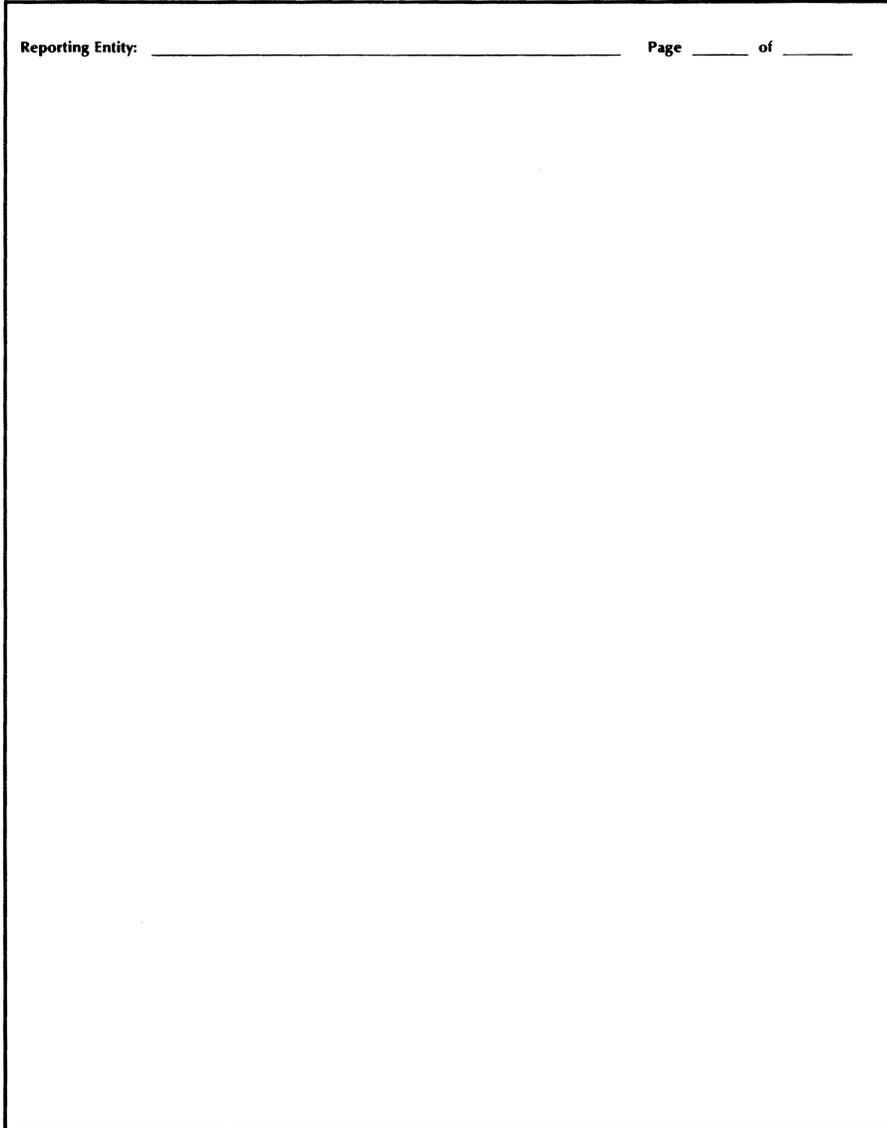
1. Identify the type of covered Federal action for which lobbying activity is and/or has been secured to influence the outcome of a covered Federal action.
2. Identify the status of the covered Federal action.
3. Identify the appropriate classification of this report. If this is a followup report caused 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 412—ACCEPTANCE OF PAYMENT FROM A NON-FEDERAL SOURCE FOR TRAVEL EXPENSES**

Sec.

412.1 Authority.

412.3 General.

412.5 Policy.

412.7 Conditions for acceptance.

412.9 Conflict of interest analysis.

412.11 Payment guidelines.

412.13 Limitations and penalties.

AUTHORITY: 5 U.S.C. 5701-5709; 12 U.S.C. 635(2)(a)(1).

SOURCE: 59 FR 31136, June 17, 1994, unless otherwise noted.

**§ 412.1 Authority.**

This part is issued under the authority of 5 U.S.C. 553, 5 U.S.C. 5701-5709 and 12 U.S.C. 635(2)(a)(1).

**§ 412.3 General.**

(a) *Applicability.* This part applies to acceptance by the Export-Import Bank of the United States (Eximbank) of payment from a non-Federal source for travel, subsistence, and related expenses with respect to the attendance of an employee in a travel status at any meeting or similar event relating to the official duties of the employee, other than those described in 41 CFR 304-1.2. This part does not authorize acceptance of such payments by an employee in his/her personal capacity.

(b) *Solicitation prohibited.* An employee shall not solicit payment for travel, subsistence and related expenses from a non-Federal source. However, after receipt of an invitation from a non-Federal source to attend a meeting or similar event, Eximbank or the employee may inform the non-Federal source of this authority.

(c) *Definitions.* As used in this part, the following definitions apply:

(1) *Conflicting non-Federal source.* *Conflicting non-Federal source* means any person who, or entity other than the Government of the United States which, has interests that may be substantially affected by the performance or nonperformance of the employee's duties.

(2) *Employee.* *Employee* means any director, officer or other employee of Eximbank.

(3) *Meeting or similar event.* *Meeting or similar event* means a meeting, formal gathering, site visit, negotiation session or similar event that takes place away from the employee's official station and which is directly related to the mission of Eximbank. This term does not include any meeting or similar function described in 41 CFR 304-1.2 or sponsored by Eximbank. A meeting or similar event need not be widely attended for purposes of this definition.

(4) *Non-Federal source.* *Non-Federal source* means any person or entity other than the Government of the United States. The term includes any individual, private or commercial entity, nonprofit organization or association, state, local, or foreign government, or international or multinational organization.

(5) *Payment.* *Payment* means funds paid or reimbursed to Eximbank by a non-Federal source for travel, subsistence, and related expenses by check or similar instrument, or payment in kind.

(6) *Payment in kind.* *Payment in kind* means goods, services or other benefits provided by a non-Federal source for travel, subsistence, and related expenses in lieu of funds paid to Eximbank by check or similar instrument for the same purpose.

(7) *Travel, subsistence and related expenses.* *Travel, subsistence and related expenses* means the same types of expenses payable under 41 CFR chapter 301.

**§ 412.5 Policy.**

As provided in this part, Eximbank may accept payment from a non-Federal source (or authorize an employee to receive such payment on its behalf) with respect to attendance of the employee at a meeting or similar event which the employee has been authorized to attend in an official capacity on behalf of Eximbank. The employee's immediate supervisor and Eximbank's designated agency ethics official or his/her designee (DAEO) must approve any offer and acceptance of payment under this part in accordance with the procedures described below. If the employee is a member of Eximbank's Board of Directors, only the DAEO's approval is required. Any employee authorized to

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travel in accordance with this part is subject to the maximum per diem or actual subsistence expense rates and transportation class of service limitations prescribed in 41 CFR chapter 301.

### § 412.7 Conditions for acceptance.

(a) Eximbank may accept payment for employee travel from a non-Federal source when a written authorization to accept payment is issued in advance of the travel following a determination by the employee's supervisor (except in the case of Board members) and the DAEO that the payment is:

(1) For travel relating to an employee's official duties under an official travel authorization issued to the employee;

(2) For attendance at a meeting or similar event as defined in § 412.3(c)(3):

(i) In which the employee's participation is necessary in order to further the mission of Eximbank;

(ii) Which cannot be held at the offices of Eximbank for justifiable business reasons in light of the location and number of participants and the purpose of the meeting or similar event; and

(iii) Which is taking place at a location and for a period of time that is appropriate for the purpose of the meeting or similar event;

(3) From a non-Federal source that is not a conflicting non-Federal source or from a conflicting non-Federal source that has been approved under § 412.9; and

(4) In an amount which does not exceed the maximum per diem or actual subsistence expense rates and transportation class of service limitations prescribed in 41 CFR chapter 301.

(b) An employee requesting approval of payment of travel expenses by a non-Federal source under this part shall submit to the employee's supervisor (except in the case of Board members) and the DAEO a written description of the following: the nature of the meeting or similar event and the reason that it cannot be held at Eximbank, the date(s) and location of the meeting or similar event, the identities of all participants in the meeting or similar event, the name of the non-Federal source offering to make the payment, the amount and method of the pro-

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posed payment, and the nature of the expenses.

(c) Payments may be accepted from multiple sources under paragraph (a) of this section.

### § 412.9 Conflict of interest analysis.

Eximbank may accept payment from a conflicting non-Federal source if the conditions of § 412.7 are met and the employee's supervisor (except in the case of Board members) and the DAEO determine that Eximbank's interest in the employee's attendance at or participation in the meeting or similar event outweighs concern that acceptance of the payment by Eximbank may cause a reasonable person to question the integrity of Eximbank's programs and operations. In determining whether to accept payment, Eximbank shall consider all relevant factors, including the purpose of the meeting or similar event, the importance of the travel for Eximbank, the nature and sensitivity of any pending matter affecting the interests of the conflicting non-Federal source, the significance of the employee's role in any such matter, the identity of other expected participants, and the location and duration of the meeting or similar event.

### § 412.11 Payment guidelines.

(a) Payments from a non-Federal source, other than payments in kind, shall be by check or similar instrument made payable to Eximbank. Payments from a non-Federal source, including payments in kind, are subject to the maximum per diem or actual subsistence expense rates and transportation class of service limitations prescribed in 41 CFR chapter 301.

(b) If Eximbank determines in advance of the travel that a payment covers some but not all of the per diem costs to be incurred by the employee, Eximbank shall authorize a reduced per diem rate, in accordance with 41 CFR part 301-7.12.

### § 412.13 Limitations and penalties.

(a) This part is in addition to and not in place of any other authority under which Eximbank may accept payment from a non-Federal source or authorize an employee to accept such payment on behalf of Eximbank. This part shall

not be applied in connection with the acceptance by Eximbank of payment for travel, subsistence, and related expenses incurred by an employee to attend a meeting or similar function described in and authorized by 41 CFR part 304–1.

(b) An employee who accepts any payment in violation of this part is subject to the following:

(1) The employee may be required, in addition to any penalty provided by law and applicable regulations, to repay for deposit to the general fund of the Treasury, an amount equal to the amount of the payment so accepted; and

(2) When repayment is required under paragraph (b)(1) of this section, the employee shall not be entitled to any payment or reimbursement from Eximbank for such expenses.

## **PART 413—GOVERNMENTWIDE DEBARMENT AND SUSPENSION (NONPROCUREMENT)**

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**APPENDIX TO PART 413—COVERED TRANSACTIONS**

**AUTHORITY:** Sec. 2455, Pub. L. 103–355, 108 Stat. 3327 (31 U.S.C. 6101 note); E.O. 11738 (3 CFR, 1973 Comp., p. 799); E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O. 12689 (3 CFR, 1989 Comp., p. 235).

**AUTHORITY:** Sec. 2455, Pub. L. 103–355, 108 Stat. 3327; E.O. 12549, 3 CFR, 1986 Comp., p.189; E.O. 12689, 3 CFR, 1989 Comp., p.235.

**SOURCE:** 68 FR 66544, 66569, 66570, Nov. 26, 2003, unless otherwise noted.

**§ 413.25 How is this part organized?**

(a) This part is subdivided into ten subparts. Each subpart contains information related to a broad topic or specific audience with special responsibilities, as shown in the following table:

In subpart . . .	You will find provisions related to . . .
A .....	general information about this rule.
B .....	the types of Ex-Im Bank transactions that are covered by the Governmentwide nonprocurement suspension and debarment system.
C .....	the responsibilities of persons who participate in covered transactions.
D .....	the responsibilities of Ex-Im Bank officials who are authorized to enter into covered transactions.
E .....	the responsibilities of Federal agencies for the <i>Excluded Parties List System</i> (Disseminated by the General Services Administration).
F .....	the general principles governing suspension, debarment, voluntary exclusion and settlement.
G .....	suspension actions.
H .....	debarment actions.
I .....	definitions of terms used in this part.
J .....	[Reserved]

(b) The following table shows which subparts may be of special interest to you, depending on who you are:

If you are . . .	See subpart(s) . . .
(1) a participant or principal in a nonprocurement transaction.	A, B, C, and I.
(2) a respondent in a suspension action	A, B, F, G and I.
(3) a respondent in a debarment action	A, B, F, H and I.
(4) a suspending official .....	A, B, D, E, F, G and I.
(5) a debarring official .....	A, B, D, E, F, H and I.
(6) a (n) Ex-Im Bank official authorized to enter into a covered transaction.	A, B, D, E and I.
(7) Reserved .....	J.

**§ 413.50 How is this part written?**

(a) This part uses a “plain language” format to make it easier for the general public and business community to use. The section headings and text, often in the form of questions and answers, must be read together.

(b) Pronouns used within this part, such as “I” and “you,” change from subpart to subpart depending on the audience being addressed. The pronoun “we” always is the Ex-Im Bank.

(c) The “Covered Transactions” diagram in the appendix to this part shows the levels or “tiers” at which

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the Ex-Im Bank enforces an exclusion under this part.

### § 413.75 Do terms in this part have special meanings?

This part uses terms throughout the text that have special meaning. Those terms are defined in Subpart I of this part. For example, three important terms are—

(a) *Exclusion or excluded*, which refers only to discretionary actions taken by a suspending or debarment official under this part or the Federal Acquisition Regulation (48 CFR part 9, subpart 9.4);

(b) *Disqualification or disqualified*, which refers to prohibitions under specific statutes, executive orders (other than Executive Order 12549 and Executive Order 12689), or other authorities. Disqualifications frequently are not subject to the discretion of an agency official, may have a different scope than exclusions, or have special conditions that apply to the disqualification; and

(c) *Ineligibility or ineligible*, which generally refers to a person who is either excluded or disqualified.

## Subpart A—General

### § 413.100 What does this part do?

This part adopts a governmentwide system of debarment and suspension for Ex-Im Bank nonprocurement activities. It also provides for reciprocal exclusion of persons who have been excluded under the Federal Acquisition Regulation, and provides for the consolidated listing of all persons who are excluded, or disqualified by statute, executive order, or other legal authority. This part satisfies the requirements in section 3 of Executive Order 12549, “Debarment and Suspension” (3 CFR 1986 Comp., p. 189), Executive Order 12689, “Debarment and Suspension” (3 CFR 1989 Comp., p. 235) and 31 U.S.C. 6101 note (Section 2455, Public Law 103-355, 108 Stat. 3327).

### § 413.105 Does this part apply to me?

Portions of this part (see table at § 413.25(b)) apply to you if you are a(n)—

(a) Person who has been, is, or may reasonably be expected to be, a partici-

pant or principal in a covered transaction;

(b) Respondent (a person against whom the Ex-Im Bank has initiated a debarment or suspension action);

(c) Ex-Im Bank debarment or suspending official; or

(d) Ex-Im Bank official who is authorized to enter into covered transactions with non-Federal parties.

### § 413.110 What is the purpose of the nonprocurement debarment and suspension system?

(a) To protect the public interest, the Federal Government ensures the integrity of Federal programs by conducting business only with responsible persons.

(b) A Federal agency uses the nonprocurement debarment and suspension system to exclude from Federal programs persons who are not presently responsible.

(c) An exclusion is a serious action that a Federal agency may take only to protect the public interest. A Federal agency may not exclude a person or commodity for the purposes of punishment.

### § 413.115 How does an exclusion restrict a person's involvement in covered transactions?

With the exceptions stated in §§ 413.120, 413.315, and 413.420, a person who is excluded by the Ex-Im Bank or any other Federal agency may not:

(a) Be a participant in a(n) Ex-Im Bank transaction that is a covered transaction under subpart B of this part;

(b) Be a participant in a transaction of any other Federal agency that is a covered transaction under that agency's regulation for debarment and suspension; or

(c) Act as a principal of a person participating in one of those covered transactions.

### § 413.120 May we grant an exception to let an excluded person participate in a covered transaction?

(a) The Ex-Im Bank agency head or designee may grant an exception permitting an excluded person to participate in a particular covered transaction. If the Ex-Im Bank agency head or designee grants an exception, the exception must be in writing and state

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the reason(s) for deviating from the governmentwide policy in Executive Order 12549.

(b) An exception granted by one agency for an excluded person does not extend to the covered transactions of another agency.

### **§ 413.125 Does an exclusion under the nonprocurement system affect a person's eligibility for Federal procurement contracts?**

If any Federal agency excludes a person under its nonprocurement common rule on or after August 25, 1995, the excluded person is also ineligible to participate in Federal procurement transactions under the FAR. Therefore, an exclusion under this part has reciprocal effect in Federal procurement transactions.

### **§ 413.130 Does exclusion under the Federal procurement system affect a person's eligibility to participate in nonprocurement transactions?**

If any Federal agency excludes a person under the FAR on or after August 25, 1995, the excluded person is also ineligible to participate in nonprocurement covered transactions under this part. Therefore, an exclusion under the FAR has reciprocal effect in Federal nonprocurement transactions.

### **§ 413.135 May the Ex-Im Bank exclude a person who is not currently participating in a nonprocurement transaction?**

Given a cause that justifies an exclusion under this part, we may exclude any person who has been involved, is currently involved, or may reasonably be expected to be involved in a covered transaction.

### **§ 413.140 How do I know if a person is excluded?**

Check the *Excluded Parties List System (EPLS)* to determine whether a person is excluded. The General Services Administration (GSA) maintains the *EPLS* and makes it available, as detailed in subpart E of this part. When a Federal agency takes an action to exclude a person under the nonprocurement or procurement debarment and suspension system, the agency enters the information about the excluded person into the *EPLS*.

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### **§ 413.145 Does this part address persons who are disqualified, as well as those who are excluded from nonprocurement transactions?**

Except if provided for in Subpart J of this part, this part—

(a) Addresses disqualified persons only to—

(1) Provide for their inclusion in the *EPLS*; and

(2) State responsibilities of Federal agencies and participants to check for disqualified persons before entering into covered transactions.

(b) Does not specify the—

(1) Ex-Im Bank transactions for which a disqualified person is ineligible. Those transactions vary on a case-by-case basis, because they depend on the language of the specific statute, Executive order, or regulation that caused the disqualification;

(2) Entities to which the disqualification applies; or

(3) Process that the agency uses to disqualify a person. Unlike exclusion, disqualification is frequently not a discretionary action that a Federal agency takes.

## **Subpart B—Covered Transactions**

### **§ 413.200 What is a covered transaction?**

A covered transaction is a nonprocurement or procurement transaction that is subject to the prohibitions of this part. It may be a transaction at—

(a) The primary tier, between a Federal agency and a person (see appendix to this part); or

(b) A lower tier, between a participant in a covered transaction and another person.

### **§ 413.205 Why is it important if a particular transaction is a covered transaction?**

The importance of a covered transaction depends upon who you are.

(a) As a participant in the transaction, you have the responsibilities laid out in Subpart C of this part. Those include responsibilities to the person or Federal agency at the next higher tier from whom you received

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the transaction, if any. They also include responsibilities if you subsequently enter into other covered transactions with persons at the next lower tier.

(b) As a Federal official who enters into a primary tier transaction, you have the responsibilities laid out in subpart D of this part.

(c) As an excluded person, you may not be a participant or principal in the transaction unless—

(1) The person who entered into the transaction with you allows you to continue your involvement in a transaction that predates your exclusion, as permitted under § 413.310 or § 413.415; or

(2) A(n) Ex-Im Bank official obtains an exception from the Ex-Im Bank agency head or designee to allow you to be involved in the transaction, as permitted under § 413.120.

### **§ 413.210 Which nonprocurement transactions are covered transactions?**

All nonprocurement transactions, as defined in § 413.970, are covered transactions unless listed in § 413.215. (See appendix to this part.)

### **§ 413.215 Which nonprocurement transactions are not covered transactions?**

The following types of nonprocurement transactions are not covered transactions:

(a) A direct award to—

(1) A foreign government or foreign governmental entity;

(2) A public international organization;

(3) An entity owned (in whole or in part) or controlled by a foreign government; or

(4) Any other entity consisting wholly or partially of one or more foreign governments or foreign governmental entities.

(b) A benefit 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). For example, if a person receives social security benefits under the Supplemental Security Income provisions of the Social Security Act, 42 U.S.C. 1301 et seq., those benefits are not covered

transactions and, therefore, are not affected if the person is excluded.

(c) Federal employment.

(d) A transaction that the Ex-Im Bank needs to respond to a national or agency-recognized emergency or disaster.

(e) A permit, license, certificate, or similar instrument issued as a means to regulate public health, safety, or the environment, unless the Ex-Im Bank specifically designates it to be a covered transaction.

(f) An incidental benefit that results from ordinary governmental operations.

(g) Any other transaction if the application of an exclusion to the transaction is prohibited by law.

### **§ 413.220 Are any procurement contracts included as covered transactions?**

(a) Covered transactions under this part—

(1) Do not include any procurement contracts awarded directly by a Federal agency; but

(2) Do include some procurement contracts awarded by non-Federal participants in nonprocurement covered transactions (see appendix to this part).

(b) Specifically, a contract for goods or services is a covered transaction if any of the following applies:

(1) The contract is awarded by a participant in a nonprocurement transaction that is covered under § 413.210, and the amount of the contract is expected to equal or exceed \$25,000.

(2) The contract requires the consent of a(n) Ex-Im Bank official. In that case, the contract, regardless of the amount, always is a covered transaction, and it does not matter who awarded it. For example, it could be a subcontract awarded by a contractor at a tier below a nonprocurement transaction, as shown in the appendix to this part.

(3) The contract is for federally-required audit services.

### **§ 413.225 How do I know if a transaction in which I may participate is a covered transaction?**

As a participant in a transaction, you will know that it is a covered

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transaction because the agency regulations governing the transaction, the appropriate agency official, or participant at the next higher tier who enters into the transaction with you, will tell you that you must comply with applicable portions of this part.

### **Subpart C—Responsibilities of Participants Regarding Transactions**

#### DOING BUSINESS WITH OTHER PERSONS

#### **§ 413.300 What must I do before I enter into a covered transaction with another person at the next lower tier?**

When you enter into a covered transaction with another person at the next lower tier, you must verify that the person with whom you intend to do business is not excluded or disqualified. You do this by:

- (a) Checking the *EPLS*; or
- (b) Collecting a certification from that person if allowed by this rule; or
- (c) Adding a clause or condition to the covered transaction with that person.

#### **§ 413.305 May I enter into a covered transaction with an excluded or disqualified person?**

(a) You as a participant may not enter into a covered transaction with an excluded person, unless the Ex-Im Bank grants an exception under § 413.120.

(b) You may not enter into any transaction with a person who is disqualified from that transaction, unless you have obtained an exception under the disqualifying statute, Executive order, or regulation.

#### **§ 413.310 What must I do if a Federal agency excludes a person with whom I am already doing business in a covered transaction?**

(a) You as a participant may continue covered transactions with an excluded person if the transactions were in existence when the agency excluded the person. However, you are not required to continue the transactions, and you may consider termination. You should make a decision about whether to terminate and the type of termination action, if any, only after a

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thorough review to ensure that the action is proper and appropriate.

(b) You may not renew or extend covered transactions (other than no-cost time extensions) with any excluded person, unless the Ex-Im Bank grants an exception under § 413.120.

#### **§ 413.315 May I use the services of an excluded person as a principal under a covered transaction?**

(a) You as a participant may continue to use the services of an excluded person as a principal under a covered transaction if you were using the services of that person in the transaction before the person was excluded. However, you are not required to continue using that person's services as a principal. You should make a decision about whether to discontinue that person's services only after a thorough review to ensure that the action is proper and appropriate.

(b) You may not begin to use the services of an excluded person as a principal under a covered transaction unless the Ex-Im Bank grants an exception under § 413.120.

#### **§ 413.320 Must I verify that principals of my covered transactions are eligible to participate?**

Yes, you as a participant are responsible for determining whether any of your principals of your covered transactions is excluded or disqualified from participating in the transaction. You may decide the method and frequency by which you do so. You may, but you are not required to, check the *EPLS*.

#### **§ 413.325 What happens if I do business with an excluded person in a covered transaction?**

If as a participant you knowingly do business with an excluded person, we may disallow costs, annul or terminate the transaction, issue a stop work order, debar or suspend you, or take other remedies as appropriate.

#### **§ 413.330 What requirements must I pass down to persons at lower tiers with whom I intend to do business?**

Before entering into a covered transaction with a participant at the next lower tier, you must require that participant to—

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(a) Comply with this subpart as a condition of participation in the transaction. You may do so using any method(s), unless § 413.440 requires you to use specific methods.

(b) Pass the requirement to comply with this subpart to each person with whom the participant enters into a covered transaction at the next lower tier.

### DISCLOSING INFORMATION—PRIMARY TIER PARTICIPANTS

#### § 413.335 What information must I provide before entering into a covered transaction with the Ex-Im Bank?

Before you enter into a covered transaction at the primary tier, you as the participant must notify the Ex-Im Bank office that is entering into the transaction with you, if you know that you or any of the principals for that covered transaction:

(a) Are presently excluded or disqualified;

(b) Have been convicted within the preceding three years of any of the offenses listed in § 413.800(a) or had a civil judgment rendered against you for one of those offenses within that time period;

(c) Are presently indicted for or otherwise criminally or civilly charged by a governmental entity (Federal, State or local) with commission of any of the offenses listed in § 413.800(a); or

(d) Have had one or more public transactions (Federal, State, or local) terminated within the preceding three years for cause or default.

#### § 413.340 If I disclose unfavorable information required under § 413.335, will I be prevented from participating in the transaction?

As a primary tier participant, your disclosure of unfavorable information about yourself or a principal under § 413.335 will not necessarily cause us to deny your participation in the covered transaction. We will consider the information when we determine whether to enter into the covered transaction. We also will consider any additional information or explanation that you elect to submit with the disclosed information.

#### § 413.345 What happens if I fail to disclose information required under § 413.335?

If we later determine that you failed to disclose information under § 413.335 that you knew at the time you entered into the covered transaction, we may—

(a) Terminate the transaction for material failure to comply with the terms and conditions of the transaction; or

(b) Pursue any other available remedies, including suspension and debarment.

#### § 413.350 What must I do if I learn of information required under § 413.335 after entering into a covered transaction with the Ex-Im Bank?

At any time after you enter into a covered transaction, you must give immediate written notice to the Ex-Im Bank office with which you entered into the transaction if you learn either that—

(a) You failed to disclose information earlier, as required by § 413.335; or

(b) Due to changed circumstances, you or any of the principals for the transaction now meet any of the criteria in § 413.335.

### DISCLOSING INFORMATION—LOWER TIER PARTICIPANTS

#### § 413.355 What information must I provide to a higher tier participant before entering into a covered transaction with that participant?

Before you enter into a covered transaction with a person at the next higher tier, you as a lower tier participant must notify that person if you know that you or any of the principals are presently excluded or disqualified.

#### § 413.360 What happens if I fail to disclose the information required under § 413.355?

If we later determine that you failed to tell the person at the higher tier that you were excluded or disqualified at the time you entered into the covered transaction with that person, we may pursue any available remedies, including suspension and debarment.

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### **§ 413.365 What must I do if I learn of information required under § 413.355 after entering into a covered transaction with a higher tier participant?**

At any time after you enter into a lower tier covered transaction with a person at a higher tier, you must provide immediate written notice to that person if you learn either that—

(a) You failed to disclose information earlier, as required by § 413.355; or

(b) Due to changed circumstances, you or any of the principals for the transaction now meet any of the criteria in § 413.355.

## **Subpart D—Responsibilities of Ex-Im Bank Officials Regarding Transactions**

### **§ 413.400 May I enter into a transaction with an excluded or disqualified person?**

(a) You as an agency official may not enter into a covered transaction with an excluded person unless you obtain an exception under § 413.120.

(b) You may not enter into any transaction with a person who is disqualified from that transaction, unless you obtain a waiver or exception under the statute, Executive order, or regulation that is the basis for the person's disqualification.

### **§ 413.405 May I enter into a covered transaction with a participant if a principal of the transaction is excluded?**

As an agency official, you may not enter into a covered transaction with a participant if you know that a principal of the transaction is excluded, unless you obtain an exception under § 413.120.

### **§ 413.410 May I approve a participant's use of the services of an excluded person?**

After entering into a covered transaction with a participant, you as an agency official may not approve a participant's use of an excluded person as a principal under that transaction, unless you obtain an exception under § 413.120.

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### **§ 413.415 What must I do if a Federal agency excludes the participant or a principal after I enter into a covered transaction?**

(a) You as an agency official may continue covered transactions with an excluded person, or under which an excluded person is a principal, if the transactions were in existence when the person was excluded. You are not required to continue the transactions, however, and you may consider termination. You should make a decision about whether to terminate and the type of termination action, if any, only after a thorough review to ensure that the action is proper.

(b) You may not renew or extend covered transactions (other than no-cost time extensions) with any excluded person, or under which an excluded person is a principal, unless you obtain an exception under § 413.120.

### **§ 413.420 May I approve a transaction with an excluded or disqualified person at a lower tier?**

If a transaction at a lower tier is subject to your approval, you as an agency official may not approve—

(a) A covered transaction with a person who is currently excluded, unless you obtain an exception under § 413.120; or

(b) A transaction with a person who is disqualified from that transaction, unless you obtain a waiver or exception under the statute, Executive order, or regulation that is the basis for the person's disqualification.

### **§ 413.425 When do I check to see if a person is excluded or disqualified?**

As an agency official, you must check to see if a person is excluded or disqualified before you—

(a) Enter into a primary tier covered transaction;

(b) Approve a principal in a primary tier covered transaction;

(c) Approve a lower tier participant if agency approval of the lower tier participant is required; or

(d) Approve a principal in connection with a lower tier transaction if agency approval of the principal is required.

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### §413.430 How do I check to see if a person is excluded or disqualified?

You check to see if a person is excluded or disqualified in two ways:

(a) You as an agency official must check the *EPLS* when you take any action listed in §413.425.

(b) You must review information that a participant gives you, as required by §413.335, about its status or the status of the principals of a transaction.

### §413.435 What must I require of a primary tier participant?

You as an agency official must require each participant in a primary tier covered transaction to—

(a) Comply with subpart C of this part as a condition of participation in the transaction; and

(b) Communicate the requirement to comply with Subpart C of this part to persons at the next lower tier with whom the primary tier participant enters into covered transactions.

### §413.440 What method do I use to communicate those requirements to participants?

To communicate the requirements, you must include a term or condition in the transaction requiring the participants' compliance with subpart C of this part and requiring them to include a similar term or condition in lower-tier covered transactions.

[68 FR 66570, Nov. 26, 2003]

### §413.445 What action may I take if a primary tier participant knowingly does business with an excluded or disqualified person?

If a participant knowingly does business with an excluded or disqualified person, you as an agency official may refer the matter for suspension and debarment consideration. You may also disallow costs, annul or terminate the transaction, issue a stop work order, or take any other appropriate remedy.

### §413.450 What action may I take if a primary tier participant fails to disclose the information required under §413.335?

If you as an agency official determine that a participant failed to disclose information, as required by §413.335, at the time it entered into a

covered transaction with you, you may—

(a) Terminate the transaction for material failure to comply with the terms and conditions of the transaction; or

(b) Pursue any other available remedies, including suspension and debarment.

### §413.455 What may I do if a lower tier participant fails to disclose the information required under §413.355 to the next higher tier?

If you as an agency official determine that a lower tier participant failed to disclose information, as required by §413.355, at the time it entered into a covered transaction with a participant at the next higher tier, you may pursue any remedies available to you, including the initiation of a suspension or debarment action.

## Subpart E—Excluded Parties List System

### §413.500 What is the purpose of the Excluded Parties List System (EPLS)?

The *EPLS* is a widely available source of the most current information about persons who are excluded or disqualified from covered transactions.

### §413.505 Who uses the EPLS?

(a) Federal agency officials use the *EPLS* to determine whether to enter into a transaction with a person, as required under §413.430.

(b) Participants also may, but are not required to, use the *EPLS* to determine if—

(1) Principals of their transactions are excluded or disqualified, as required under §413.320; or

(2) Persons with whom they are entering into covered transactions at the next lower tier are excluded or disqualified.

(c) The *EPLS* is available to the general public.

### §413.510 Who maintains the EPLS?

In accordance with the OMB guidelines, the General Services Administration (GSA) maintains the *EPLS*. When

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a Federal agency takes an action to exclude a person under the nonprocurement or procurement debarment and suspension system, the agency enters the information about the excluded person into the *EPLS*.

### §413.515 What specific information is in the *EPLS*?

(a) At a minimum, the *EPLS* indicates—

(1) The full name (where available) and address of each excluded or disqualified person, in alphabetical order, with cross references if 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 the action;

(6) The agency and name and telephone number of the agency point of contact for the action; and

(7) The Dun and Bradstreet Number (DUNS), or other similar code approved by the GSA, of the excluded or disqualified person, if available.

(b)(1) The database for the *EPLS* includes a field for the Taxpayer Identification Number (TIN) (the social security number (SSN) for an individual) of an excluded or disqualified person.

(2) Agencies disclose the SSN of an individual to verify the identity of an individual, only if permitted under the Privacy Act of 1974 and, if appropriate, the Computer Matching and Privacy Protection Act of 1988, as codified in 5 U.S.C. 552(a).

### §413.520 Who places the information into the *EPLS*?

Federal officials who take actions to exclude persons under this part or officials who are responsible for identifying disqualified persons must enter the following information about those persons into the *EPLS*:

(a) Information required by §413.515(a);

(b) The Taxpayer Identification Number (TIN) of the excluded or disqualified person, including the social security number (SSN) for an individual, if

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the number is available and may be disclosed under law;

(c) Information about an excluded or disqualified person, generally within five working days, after—

(1) Taking an exclusion action;

(2) Modifying or rescinding an exclusion action;

(3) Finding that a person is disqualified; or

(4) Finding that there has been a change in the status of a person who is listed as disqualified.

### §413.525 Whom do I ask if I have questions about a person in the *EPLS*?

If you have questions about a person in the *EPLS*, ask the point of contact for the Federal agency that placed the person's name into the *EPLS*. You may find the agency point of contact from the *EPLS*.

### §413.530 Where can I find the *EPLS*?

(a) You may access the *EPLS* through the Internet, currently at <http://epls.arnet.gov>.

(b) As of November 26, 2003, you may also subscribe to a printed version. However, we anticipate discontinuing the printed version. Until it is discontinued, you may obtain the printed version by purchasing a yearly subscription from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402, or by calling the Government Printing Office Inquiry and Order Desk at (202) 783-3238.

## Subpart F—General Principles Relating to Suspension and Debarment Actions

### §413.600 How do suspension and debarment actions start?

When we receive information from any source concerning a cause for suspension or debarment, we will promptly report and investigate it. We refer the question of whether to suspend or debar you to our suspending or debarment official for consideration, if appropriate.

**§ 413.605 How does suspension differ from debarment?**

Suspension differs from debarment in that—

A suspending official . . .	A debarring official . . .
(a) Imposes suspension as a temporary status of ineligibility for procurement and nonprocurement transactions, pending completion of an investigation or legal proceedings.	Imposes debarment for a specified period as a final determination that a person is not presently responsible.
(b) Must— (1) Have <i>adequate evidence</i> that there may be a cause for debarment of a person; and (2) Conclude that <i>immediate action</i> is necessary to protect the Federal interest.	Must conclude, based on a <i>preponderance of the evidence</i> , that the person has engaged in conduct that warrants debarment.
(c) Usually imposes the suspension <i>first</i> , and then promptly notifies the suspended person, giving the person an opportunity to contest the suspension and have it lifted.	Imposes debarment <i>after</i> giving the respondent notice of the action and an opportunity to contest the proposed debarment.

**§ 413.610 What procedures does the Ex-Im Bank use in suspension and debarment actions?**

In deciding whether to suspend or debar you, we handle the actions as informally as practicable, consistent with principles of fundamental fairness.

(a) For suspension actions, we use the procedures in this subpart and subpart G of this part.

(b) For debarment actions, we use the procedures in this subpart and subpart H of this part.

**§ 413.615 How does the Ex-Im Bank notify a person of a suspension or debarment action?**

(a) The suspending or debarring official sends a written notice to the last known street address, facsimile number, or e-mail address of—

- (1) You or your identified counsel; or
- (2) Your agent for service of process, or any of your partners, officers, directors, owners, or joint venturers.

(b) The notice is effective if sent to any of these persons.

**§ 413.620 Do Federal agencies coordinate suspension and debarment actions?**

Yes, when more than one Federal agency has an interest in a suspension or debarment, the agencies may consider designating one agency as the lead agency for making the decision. Agencies are encouraged to establish methods and procedures for coordinating their suspension and debarment actions.

**§ 413.625 What is the scope of a suspension or debarment?**

If you are suspended or debarred, the suspension or debarment is effective as follows:

(a) Your suspension or debarment constitutes suspension or debarment of all of your divisions and other organizational elements from all covered transactions, unless the suspension or debarment decision is limited—

- (1) By its terms to one or more specifically identified individuals, divisions, or other organizational elements; or
- (2) To specific types of transactions.

(b) Any affiliate of a participant may be included in a suspension or debarment action if the suspending or debarring official—

- (1) Officially names the affiliate in the notice; and
- (2) Gives the affiliate an opportunity to contest the action.

**§ 413.630 May the Ex-Im Bank impute conduct of one person to another?**

For purposes of actions taken under this rule, we may impute conduct as follows:

(a) *Conduct imputed from an individual to an organization.* We may impute the fraudulent, criminal, or other improper conduct of any officer, director, shareholder, partner, employee, or other individual associated with an organization, to that organization when the improper conduct occurred in connection with the individual's performance of duties for or on behalf of that organization, or with the organization's knowledge, approval or acquiescence. The organization's acceptance of the benefits

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derived from the conduct is evidence of knowledge, approval or acquiescence.

(b) *Conduct imputed from an organization to an individual, or between individuals.* We may impute the fraudulent, criminal, or other improper conduct of any organization to an individual, or from one individual to another individual, if the individual to whom the improper conduct is imputed either participated in, had knowledge of, or reason to know of the improper conduct.

(c) *Conduct imputed from one organization to another organization.* We may impute the fraudulent, criminal, or other improper conduct of one organization to another organization when the improper conduct occurred in connection with a partnership, joint venture, joint application, association or similar arrangement, or when the organization to whom the improper conduct is imputed has the power to direct, manage, control or influence the activities of the organization responsible for the improper conduct. Acceptance of the benefits derived from the conduct is evidence of knowledge, approval or acquiescence.

**§ 413.635 May the Ex-Im Bank settle a debarment or suspension action?**

Yes, we may settle a debarment or suspension action at any time if it is in the best interest of the Federal Government.

**§ 413.640 May a settlement include a voluntary exclusion?**

Yes, if we enter into a settlement with you in which you agree to be excluded, it is called a voluntary exclusion and has governmentwide effect.

**§ 413.645 Do other Federal agencies know if the Ex-Im Bank agrees to a voluntary exclusion?**

(a) Yes, we enter information regarding a voluntary exclusion into the *EPLS*.

(b) Also, any agency or person may contact us to find out the details of a voluntary exclusion.

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**Subpart G—Suspension**

**§ 413.700 When may the suspending official issue a suspension?**

Suspension is a serious action. Using the procedures of this subpart and subpart F of this part, the suspending official may impose suspension only when that official determines that—

(a) There exists an indictment for, or other adequate evidence to suspect, an offense listed under § 413.800(a), or

(b) There exists adequate evidence to suspect any other cause for debarment listed under § 413.800(b) through (d); and

(c) Immediate action is necessary to protect the public interest.

**§ 413.705 What does the suspending official consider in issuing a suspension?**

(a) In determining the adequacy of the evidence to support the suspension, the suspending official considers 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. During this assessment, the suspending official may examine the basic documents, including grants, cooperative agreements, loan authorizations, contracts, and other relevant documents.

(b) An indictment, conviction, civil judgment, or other official findings by Federal, State, or local bodies that determine factual and/or legal matters, constitutes adequate evidence for purposes of suspension actions.

(c) In deciding whether immediate action is needed to protect the public interest, the suspending official has wide discretion. For example, the suspending official may infer the necessity for immediate action to protect the public interest either from the nature of the circumstances giving rise to a cause for suspension or from potential business relationships or involvement with a program of the Federal Government.

**§ 413.710 When does a suspension take effect?**

A suspension is effective when the suspending official signs the decision to suspend.

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### § 413.715 What notice does the suspending official give me if I am suspended?

After deciding to suspend you, the suspending official promptly sends you a Notice of Suspension advising you—

- (a) That you have been suspended;
- (b) That your suspension is based on—

- (1) An indictment;
- (2) A conviction;
- (3) Other adequate evidence that you have committed irregularities which seriously reflect on the propriety of further Federal Government dealings with you; or

- (4) Conduct of another person that has been imputed to you, or your affiliation with a suspended or debarred person;

- (c) Of any other irregularities in terms sufficient to put you on notice without disclosing the Federal Government's evidence;

- (d) Of the cause(s) upon which we relied under § 413.700 for imposing suspension;

- (e) That your suspension is for a temporary period pending the completion of an investigation or resulting legal or debarment proceedings;

- (f) Of the applicable provisions of this subpart, Subpart F of this part, and any other Ex-Im Bank procedures governing suspension decision making; and

- (g) Of the governmentwide effect of your suspension from procurement and nonprocurement programs and activities.

### § 413.720 How may I contest a suspension?

If you as a respondent wish to contest a suspension, you or your representative must provide the suspending official with information in opposition to the suspension. You may do this orally or in writing, but any information provided orally that you consider important must also be submitted in writing for the official record.

### § 413.725 How much time do I have to contest a suspension?

- (a) As a respondent you or your representative must either send, or make arrangements to appear and present, the information and argument to the sus-

pending official within 30 days after you receive the Notice of Suspension.

- (b) We consider the notice to be received by you—

- (1) When delivered, if we mail the notice to the last known street address, or five days after we send it if the letter is undeliverable;

- (2) When sent, if we send the notice by facsimile or five days after we send it if the facsimile is undeliverable; or

- (3) When delivered, if we send the notice by e-mail or five days after we send it if the e-mail is undeliverable.

### § 413.730 What information must I provide to the suspending official if I contest a suspension?

- (a) In addition to any information and argument in opposition, as a respondent your submission to the suspending official must identify—

- (1) Specific facts that contradict the statements contained in the Notice of Suspension. A general denial is insufficient to raise a genuine dispute over facts material to the suspension;

- (2) All existing, proposed, or prior exclusions under regulations implementing E.O. 12549 and all similar actions taken by Federal, state, or local agencies, including administrative agreements that affect only those agencies;

- (3) All criminal and civil proceedings not included in the Notice of Suspension that grew out of facts relevant to the cause(s) stated in the notice; and

- (4) All of your affiliates.

- (b) If you fail to disclose this information, or provide false information, the Ex-Im Bank may seek further criminal, civil or administrative action against you, as appropriate.

### § 413.735 Under what conditions do I get an additional opportunity to challenge the facts on which the suspension is based?

- (a) You as a respondent will not have an additional opportunity to challenge the facts if the suspending official determines that—

- (1) Your suspension is based upon an indictment, conviction, civil judgment, or other finding by a Federal, State, or local body for which an opportunity to contest the facts was provided;

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(2) Your presentation in opposition contains only general denials to information contained in the Notice of Suspension;

(3) The issues raised in your presentation in opposition to the suspension are not factual in nature, or are not material to the suspending official's initial decision to suspend, or the official's decision whether to continue the suspension; or

(4) On the basis of advice from the Department of Justice, an office of the United States Attorney, a State attorney general's office, or a State or local prosecutor's office, that substantial interests of the government in pending or contemplated legal proceedings based on the same facts as the suspension would be prejudiced by conducting fact-finding.

(b) You will have an opportunity to challenge the facts if the suspending official determines that—

(1) The conditions in paragraph (a) of this section do not exist; and

(2) Your presentation in opposition raises a genuine dispute over facts material to the suspension.

(c) If you have an opportunity to challenge disputed material facts under this section, the suspending official or designee must conduct additional proceedings to resolve those facts.

**§ 413.740 Are suspension proceedings formal?**

(a) Suspension proceedings are conducted in a fair and informal manner. The suspending official may use flexible procedures to allow you to present matters in opposition. In so doing, the suspending official is not required to follow formal rules of evidence or procedure in creating an official record upon which the official will base a final suspension decision.

(b) You as a respondent or your representative must submit any documentary evidence you want the suspending official to consider.

**§ 413.745 How is fact-finding conducted?**

(a) If fact-finding is conducted—

(1) You may present witnesses and other evidence, and confront any witness presented; and

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(2) The fact-finder must prepare written findings of fact for the record.

(b) A transcribed record of fact-finding proceedings must be made, unless you as a respondent and the Ex-Im Bank agree to waive it in advance. If you want a copy of the transcribed record, you may purchase it.

**§ 413.750 What does the suspending official consider in deciding whether to continue or terminate my suspension?**

(a) The suspending official bases the decision on all information contained in the official record. The record includes—

(1) All information in support of the suspending official's initial decision to suspend you;

(2) Any further information and argument presented in support of, or opposition to, the suspension; and

(3) Any transcribed record of fact-finding proceedings.

(b) The suspending official may refer disputed material facts to another official for findings of fact. The suspending official may reject any resulting findings, in whole or in part, only after specifically determining them to be arbitrary, capricious, or clearly erroneous.

**§ 413.755 When will I know whether the suspension is continued or terminated?**

The suspending official must make a written decision whether to continue, modify, or terminate your suspension within 45 days of closing the official record. The official record closes upon the suspending official's receipt of final submissions, information and findings of fact, if any. The suspending official may extend that period for good cause.

**§ 413.760 How long may my suspension last?**

(a) If legal or debarment proceedings are initiated at the time of, or during your suspension, the suspension may continue until the conclusion of those proceedings. However, if proceedings are not initiated, a suspension may not exceed 12 months.

(b) The suspending official may extend the 12 month limit under paragraph (a) of this section for an additional 6 months if an office of a U.S.

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Assistant Attorney General, U.S. Attorney, or other responsible prosecuting official requests an extension in writing. In no event may a suspension exceed 18 months without initiating proceedings under paragraph (a) of this section.

(c) The suspending official must notify the appropriate officials under paragraph (b) of this section of an impending termination of a suspension at least 30 days before the 12 month period expires to allow the officials an opportunity to request an extension.

### Subpart H—Debarment

#### § 413.800 What are the causes for debarment?

We may debar a person 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, tax evasion, 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 your present responsibility;

(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, or a procurement debarment by any Federal agency taken pursuant to 48 CFR part 9, subpart 9.4, before August 25, 1995;

(2) Knowingly doing business with an ineligible person, except as permitted under § 413.120;

(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 § 413.640 or of any settlement of a debarment or suspension action; or

(5) Violation of the provisions of the Drug-Free Workplace Act of 1988 (41 U.S.C. 701); or

(d) Any other cause of so serious or compelling a nature that it affects your present responsibility.

#### § 413.805 What notice does the debarring official give me if I am proposed for debarment?

After consideration of the causes in § 413.800 of this subpart, if the debarring official proposes to debar you, the official sends you a Notice of Proposed Debarment, pursuant to § 413.615, advising you—

(a) That the debarring official is considering debarring you;

(b) Of the reasons for proposing to debar you in terms sufficient to put you on notice of the conduct or transactions upon which the proposed debarment is based;

(c) Of the cause(s) under § 413.800 upon which the debarring official relied for proposing your debarment;

(d) Of the applicable provisions of this subpart, Subpart F of this part, and any other Ex-Im Bank procedures governing debarment; and

(e) Of the governmentwide effect of a debarment from procurement and non-procurement programs and activities.

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### § 413.810 When does a debarment take effect?

A debarment is not effective until the debarring official issues a decision. The debarring official does not issue a decision until the respondent has had an opportunity to contest the proposed debarment.

### §413.815 How may I contest a proposed debarment?

If you as a respondent wish to contest a proposed debarment, you or your representative must provide the debarring official with information in opposition to the proposed debarment. You may do this orally or in writing, but any information provided orally that you consider important must also be submitted in writing for the official record.

### §413.820 How much time do I have to contest a proposed debarment?

(a) As a respondent you or your representative must either send, or make arrangements to appear and present, the information and argument to the debarring official within 30 days after you receive the Notice of Proposed Debarment.

(b) We consider the Notice of Proposed Debarment to be received by you—

(1) When delivered, if we mail the notice to the last known street address, or five days after we send it if the letter is undeliverable;

(2) When sent, if we send the notice by facsimile or five days after we send it if the facsimile is undeliverable; or

(3) When delivered, if we send the notice by e-mail or five days after we send it if the e-mail is undeliverable.

### §413.825 What information must I provide to the debarring official if I contest a proposed debarment?

(a) In addition to any information and argument in opposition, as a respondent your submission to the debarring official must identify—

(1) Specific facts that contradict the statements contained in the Notice of Proposed Debarment. Include any information about any of the factors listed in §413.860. A general denial is insufficient to raise a genuine dispute over facts material to the debarment;

(2) All existing, proposed, or prior exclusions under regulations implementing E.O. 12549 and all similar actions taken by Federal, State, or local agencies, including administrative agreements that affect only those agencies;

(3) All criminal and civil proceedings not included in the Notice of Proposed Debarment that grew out of facts relevant to the cause(s) stated in the notice; and

(4) All of your affiliates.

(b) If you fail to disclose this information, or provide false information, the Ex-Im Bank may seek further criminal, civil or administrative action against you, as appropriate.

### §413.830 Under what conditions do I get an additional opportunity to challenge the facts on which a proposed debarment is based?

(a) You as a respondent will not have an additional opportunity to challenge the facts if the debarring official determines that—

(1) Your debarment is based upon a conviction or civil judgment;

(2) Your presentation in opposition contains only general denials to information contained in the Notice of Proposed Debarment; or

(3) The issues raised in your presentation in opposition to the proposed debarment are not factual in nature, or are not material to the debarring official's decision whether to debar.

(b) You will have an additional opportunity to challenge the facts if the debarring official determines that—

(1) The conditions in paragraph (a) of this section do not exist; and

(2) Your presentation in opposition raises a genuine dispute over facts material to the proposed debarment.

(c) If you have an opportunity to challenge disputed material facts under this section, the debarring official or designee must conduct additional proceedings to resolve those facts.

### §413.835 Are debarment proceedings formal?

(a) Debarment proceedings are conducted in a fair and informal manner. The debarring official may use flexible procedures to allow you as a respondent to present matters in opposition. In

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so doing, the debarring official is not required to follow formal rules of evidence or procedure in creating an official record upon which the official will base the decision whether to debar.

(b) You or your representative must submit any documentary evidence you want the debarring official to consider.

### §413.840 How is fact-finding conducted?

(a) If fact-finding is conducted—

(1) You may present witnesses and other evidence, and confront any witness presented; and

(2) The fact-finder must prepare written findings of fact for the record.

(b) A transcribed record of fact-finding proceedings must be made, unless you as a respondent and the Ex-Im Bank agree to waive it in advance. If you want a copy of the transcribed record, you may purchase it.

### §413.845 What does the debarring official consider in deciding whether to debar me?

(a) The debarring official may debar you for any of the causes in §413.800. However, the official need not debar you even if a cause for debarment exists. The official may consider the seriousness of your acts or omissions and the mitigating or aggravating factors set forth at §413.860.

(b) The debarring official bases the decision on all information contained in the official record. The record includes—

(1) All information in support of the debarring official's proposed debarment;

(2) Any further information and argument presented in support of, or in opposition to, the proposed debarment; and

(3) Any transcribed record of fact-finding proceedings.

(c) The debarring official may refer disputed material facts to another official for findings of fact. The debarring official may reject any resultant findings, in whole or in part, only after specifically determining them to be arbitrary, capricious, or clearly erroneous.

### §413.850 What is the standard of proof in a debarment action?

(a) In any debarment action, we must establish the cause for debarment by a preponderance of the evidence.

(b) If the proposed debarment is based upon a conviction or civil judgment, the standard of proof is met.

### §413.855 Who has the burden of proof in a debarment action?

(a) We have the burden to prove that a cause for debarment exists.

(b) Once a cause for debarment is established, you as a respondent have the burden of demonstrating to the satisfaction of the debarring official that you are presently responsible and that debarment is not necessary.

### §413.860 What factors may influence the debarring official's decision?

This section lists the mitigating and aggravating factors that the debarring official may consider in determining whether to debar you and the length of your debarment period. The debarring official may consider other factors if appropriate in light of the circumstances of a particular case. The existence or nonexistence of any factor, such as one of those set forth in this section, is not necessarily determinative of your present responsibility. In making a debarment decision, the debarring official may consider the following factors:

(a) The actual or potential harm or impact that results or may result from the wrongdoing.

(b) The frequency of incidents and/or duration of the wrongdoing.

(c) Whether there is a pattern or prior history of wrongdoing. For example, if you have been found by another Federal agency or a State agency to have engaged in wrongdoing similar to that found in the debarment action, the existence of this fact may be used by the debarring official in determining that you have a pattern or prior history of wrongdoing.

(d) Whether you are or have been excluded or disqualified by an agency of the Federal Government or have not been allowed to participate in State or local contracts or assistance agreements on a basis of conduct similar to

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one or more of the causes for debarment specified in this part.

(e) Whether you have entered into an administrative agreement with a Federal agency or a State or local government that is not governmentwide but is based on conduct similar to one or more of the causes for debarment specified in this part.

(f) Whether and to what extent you planned, initiated, or carried out the wrongdoing.

(g) Whether you have accepted responsibility for the wrongdoing and recognize the seriousness of the misconduct that led to the cause for debarment.

(h) Whether you have paid or agreed to pay all criminal, civil and administrative liabilities for the improper activity, including any investigative or administrative costs incurred by the government, and have made or agreed to make full restitution.

(i) Whether you have cooperated fully with the government agencies during the investigation and any court or administrative action. In determining the extent of cooperation, the debarring official may consider when the cooperation began and whether you disclosed all pertinent information known to you.

(j) Whether the wrongdoing was pervasive within your organization.

(k) The kind of positions held by the individuals involved in the wrongdoing.

(l) Whether your organization took appropriate corrective action or remedial measures, such as establishing ethics training and implementing programs to prevent recurrence.

(m) Whether your principals tolerated the offense.

(n) Whether you brought the activity cited as a basis for the debarment to the attention of the appropriate government agency in a timely manner.

(o) Whether you have fully investigated the circumstances surrounding the cause for debarment and, if so, made the result of the investigation available to the debarring official.

(p) Whether you had effective standards of conduct and internal control systems in place at the time the questioned conduct occurred.

(q) Whether you have taken appropriate disciplinary action against the

individuals responsible for the activity which constitutes the cause for debarment.

(r) Whether you have had adequate time to eliminate the circumstances within your organization that led to the cause for the debarment.

(s) Other factors that are appropriate to the circumstances of a particular case.

**§413.865 How long may my debarment last?**

(a) If the debarring official decides to debar you, your period of debarment will be based on the seriousness of the cause(s) upon which your debarment is based. Generally, debarment should not exceed three years. However, if circumstances warrant, the debarring official may impose a longer period of debarment.

(b) In determining the period of debarment, the debarring official may consider the factors in §413.860. If a suspension has preceded your debarment, the debarring official must consider the time you were suspended.

(c) If the debarment is for a violation of the provisions of the Drug-Free Workplace Act of 1988, your period of debarment may not exceed five years.

**§413.870 When do I know if the debarring official debars me?**

(a) The debarring official must make a written decision whether to debar within 45 days of closing the official record. The official record closes upon the debarring official's receipt of final submissions, information and findings of fact, if any. The debarring official may extend that period for good cause.

(b) The debarring official sends you written notice, pursuant to §413.615 that the official decided, either—

(1) Not to debar you; or

(2) To debar you. In this event, the notice:

(i) Refers to the Notice of Proposed Debarment;

(ii) Specifies the reasons for your debarment;

(iii) States the period of your debarment, including the effective dates; and

(iv) Advises you that your debarment is effective for covered transactions and contracts that are subject to the

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Federal Acquisition Regulation (48 CFR chapter 1), throughout the executive branch of the Federal Government unless an agency head or an authorized designee grants an exception.

### § 413.875 May I ask the debarring official to reconsider a decision to debar me?

Yes, as a debarred person you may ask the debarring official to reconsider the debarment decision or to reduce the time period or scope of the debarment. However, you must put your request in writing and support it with documentation.

### § 413.880 What factors may influence the debarring official during reconsideration?

The debarring official may reduce or terminate your debarment based on—

- (a) Newly discovered material evidence;
- (b) A reversal of the conviction or civil judgment upon which your debarment was based;
- (c) A bona fide change in ownership or management;
- (d) Elimination of other causes for which the debarment was imposed; or
- (e) Other reasons the debarring official finds appropriate.

### § 413.885 May the debarring official extend a debarment?

(a) Yes, the debarring official may extend a debarment for an additional period, if that official determines that an extension is necessary to protect the public interest.

(b) However, the debarring official may not extend a debarment solely on the basis of the facts and circumstances upon which the initial debarment action was based.

(c) If the debarring official decides that a debarment for an additional period is necessary, the debarring official must follow the applicable procedures in this subpart, and subpart F of this part, to extend the debarment.

## Subpart I—Definitions

### § 413.900 Adequate evidence.

*Adequate evidence* means information sufficient to support the reasonable be-

lief that a particular act or omission has occurred.

### § 413.905 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. The ways we use to determine control include, but are not limited to—

- (a) Interlocking management or ownership;
- (b) Identity of interests among family members;
- (c) Shared facilities and equipment;
- (d) Common use of employees; or
- (e) A business entity which has been organized following the exclusion of a person which has the same or similar management, ownership, or principal employees as the excluded person.

### § 413.910 Agency.

*Agency* means any United States executive department, military department, defense agency, or any other agency of the executive branch. Other agencies of the Federal government are not considered “agencies” for the purposes of this part unless they issue regulations adopting the governmentwide Debarment and Suspension system under Executive orders 12549 and 12689.

### § 413.915 Agent or representative.

*Agent or representative* means any person who acts on behalf of, or who is authorized to commit, a participant in a covered transaction.

### § 413.920 Civil judgment.

*Civil judgment* means the disposition of a civil action by any court of competent jurisdiction, whether by verdict, decision, settlement, stipulation, other disposition which creates a civil liability for the complained of wrongful acts, or a final determination of liability under the Program Fraud Civil Remedies Act of 1988 (31 U.S.C. 3801–3812).

### § 413.925 Conviction.

*Conviction* means—

- (a) A judgment or any other determination of guilt of a criminal offense by any court of competent jurisdiction,

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whether entered upon a verdict or plea, including a plea of nolo contendere; or

(b) Any other resolution that is the functional equivalent of a judgment, including probation before judgment and deferred prosecution. A disposition without the participation of the court is the functional equivalent of a judgment only if it includes an admission of guilt.

**§ 413.930 Debarment.**

*Debarment* means an action taken by a debarment official under subpart H of this part to exclude a person from participating in covered transactions and transactions covered under the Federal Acquisition Regulation (48 CFR chapter 1). A person so excluded is debarred.

**§ 413.935 Debarment official.**

(a) *Debarment official* means an agency official who is authorized to impose debarment. A debarment official is either—

- (1) The agency head; or
  - (2) An official designated by the agency head.
- (b) [Reserved]

**§ 413.940 Disqualified.**

*Disqualified* means that a person is prohibited from participating in specified Federal procurement or nonprocurement transactions as required under a statute, Executive order (other than Executive Orders 12549 and 12689) or other authority. Examples of disqualifications include persons prohibited under—

- (a) The Davis-Bacon Act (40 U.S.C. 276(a));
- (b) The equal employment opportunity acts and Executive orders; or
- (c) The Clean Air Act (42 U.S.C. 7606), Clean Water Act (33 U.S.C. 1368) and Executive Order 11738 (3 CFR, 1973 Comp., p. 799).

**§ 413.945 Excluded or exclusion.**

*Excluded or exclusion* means—

- (a) That a person or commodity is prohibited from being a participant in covered transactions, whether the person has been suspended; debarred; proposed for debarment under 48 CFR part 9, subpart 9.4; voluntarily excluded; or
- (b) The act of excluding a person.

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**§ 413.950 Excluded Parties List System**

*Excluded Parties List System (EPLS)* means the list maintained and disseminated by the General Services Administration (GSA) containing the names and other information about persons who are ineligible. The *EPLS* system includes the printed version entitled, “List of Parties Excluded or Disqualified from Federal Procurement and Nonprocurement Programs,” so long as published.

**§ 413.955 Indictment.**

*Indictment* means an indictment for a criminal offense. A presentment, information, or other filing by a competent authority charging a criminal offense shall be given the same effect as an indictment.

**§ 413.960 Ineligible or ineligibility.**

*Ineligible or ineligibility* means that a person or commodity is prohibited from covered transactions because of an exclusion or disqualification.

**§ 413.965 Legal proceedings.**

*Legal proceedings* means any criminal proceeding or any civil judicial proceeding, including a proceeding under the Program Fraud Civil Remedies Act (31 U.S.C. 3801–3812), to which the Federal Government or a State or local government or quasi-governmental authority is a party. The term also includes appeals from those proceedings.

**§ 413.970 Nonprocurement transaction.**

(a) *Nonprocurement transaction* means any transaction, regardless of type (except procurement contracts), including, but not limited to the following:

- (1) Grants.
- (2) Cooperative agreements.
- (3) Scholarships.
- (4) Fellowships.
- (5) Contracts of assistance.
- (6) Loans.
- (7) Loan guarantees.
- (8) Subsidies.
- (9) Insurances.
- (10) Payments for specified uses.
- (11) Donation agreements.

(b) A nonprocurement transaction at any tier does not require the transfer of Federal funds.

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**§ 413.975 Notice.**

*Notice* means a written communication served in person, sent by certified mail or its equivalent, or sent electronically by e-mail or facsimile. (See § 413.615.)

**§ 413.980 Participant.**

*Participant* means any person who submits a proposal for or who enters into a covered transaction, including an agent or representative of a participant.

**§ 413.985 Person.**

*Person* means any individual, corporation, partnership, association, unit of government, or legal entity, however organized.

**§ 413.990 Preponderance of the evidence.**

*Preponderance of the evidence* means proof by information that, compared with information opposing it, leads to the conclusion that the fact at issue is more probably true than not.

**§ 413.995 Principal.**

*Principal* means—

(a) An officer, director, owner, partner, principal investigator, or other person within a participant with management or supervisory responsibilities related to a covered transaction; or

(b) A consultant or other person, whether or not employed by the participant or paid with Federal funds, who—

(1) Is in a position to handle Federal funds;

(2) Is in a position to influence or control the use of those funds; or,

(3) Occupies a technical or professional position capable of substantially influencing the development or outcome of an activity required to perform the covered transaction.

**§ 413.1000 Respondent.**

*Respondent* means a person against whom an agency has initiated a debarment or suspension action.

**§ 413.1005 State.**

(a) *State* means—

(1) Any of the states of the United States;

(2) The District of Columbia;

(3) The Commonwealth of Puerto Rico;

(4) Any territory or possession of the United States; or

(5) Any agency or instrumentality of a state.

(b) For purposes of this part, *State* does not include institutions of higher education, hospitals, or units of local government.

**§ 413.1010 Suspending official.**

(a) *Suspending official* means an agency official who is authorized to impose suspension. The suspending official is either:

(1) The agency head; or

(2) An official designated by the agency head.

(b) [Reserved]

**§ 413.1015 Suspension.**

*Suspension* is an action taken by a suspending official under subpart G of this part that immediately prohibits a person from participating in covered transactions and transactions covered under the Federal Acquisition Regulation (48 CFR chapter 1) for a temporary period, pending completion of an agency investigation and any judicial or administrative proceedings that may ensue. A person so excluded is suspended.

**§ 413.1020 Voluntary exclusion or voluntarily excluded.**

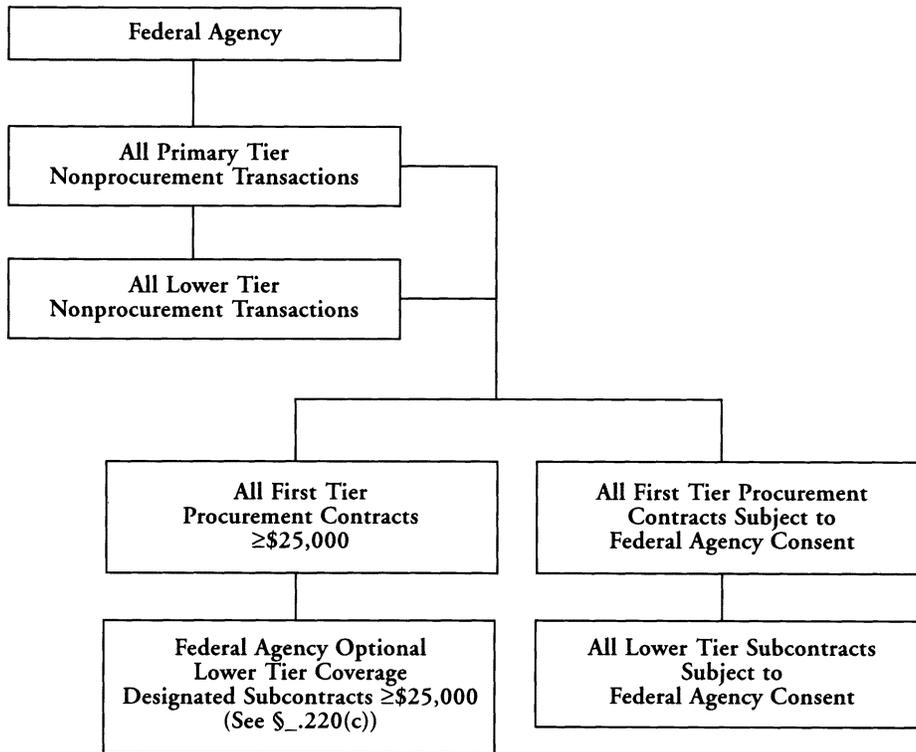
(a) *Voluntary exclusion* means a person's agreement to be excluded under the terms of a settlement between the person and one or more agencies. Voluntary exclusion must have governmentwide effect.

(b) *Voluntarily excluded* means the status of a person who has agreed to a voluntary exclusion.

**Subpart J [Reserved]**

APPENDIX TO PART 413—COVERED TRANSACTIONS

COVERED TRANSACTIONS



PARTS 414-499 [RESERVED]