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Code of Federal Regulations

6

As of January 1, 2006

Homeland Security

Containing a codification of documents
of general applicability and future effect

As of January 1, 2006

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Cite this Code: CFR

To cite the regulations in this volume use title, part and section number. Thus, 6 CFR 5.1 *refers to title 6, part 5, section 1.*

Explanation

The Code of Federal Regulations is a codification of the general and permanent rules published in the Federal Register by the Executive departments and agencies of the Federal Government. The Code is divided into 50 titles which represent broad areas subject to Federal regulation. Each title is divided into chapters which usually bear the name of the issuing agency. Each chapter is further subdivided into parts covering specific regulatory areas.

Each volume of the Code is revised at least once each calendar year and issued on a quarterly basis approximately as follows:

Title 1 through Title 16.....as of January 1
Title 17 through Title 27.....as of April 1
Title 28 through Title 41.....as of July 1
Title 42 through Title 50.....as of October 1

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To determine whether a Code volume has been amended since its revision date (in this case, January 1, 2006), consult the ''List of CFR Sections Affected (LSA),'' which is issued monthly, and the ''Cumulative List of Parts Affected,'' which appears in the Reader Aids section of the daily Federal Register. These two lists will identify the Federal Register page number of the latest amendment of any given rule.

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OMB CONTROL NUMBERS

The Paperwork Reduction Act of 1980 (Pub. L. 96–511) requires Federal agencies to display an OMB control number with their information collection request.

Many agencies have begun publishing numerous OMB control numbers as amendments to existing regulations in the CFR. These OMB numbers are placed as close as possible to the applicable recordkeeping or reporting requirements.

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Provisions that become obsolete before the revision date stated on the cover of each volume are not carried. Code users may find the text of provisions in effect on a given date in the past by using the appropriate numerical list of sections affected. For the period before January 1, 2001, consult either the List of CFR Sections Affected, 1949–1963, 1964–1972, 1973–1985, or 1986–2000, published in 11 separate volumes. For the period beginning January 1, 2001, a ''List of CFR Sections Affected'' is published at the end of each CFR volume.

CFR INDEXES AND TABULAR GUIDES

A subject index to the Code of Federal Regulations is contained in a separate volume, revised annually as of January 1, entitled CFR INDEX AND FINDING AIDS. This volume contains the Parallel Table of Statutory Authorities and Agency Rules (Table I). A list of CFR titles, chapters, and parts and an alphabetical list of agencies publishing in the CFR are also included in this volume.

An index to the text of ''Title 3—The President'' is carried within that volume.

The Federal Register Index is issued monthly in cumulative form. This index is based on a consolidation of the ''Contents'' entries in the daily Federal Register.

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For a legal interpretation or explanation of any regulation in this volume, contact the issuing agency. The issuing agency's name appears at the top of odd-numbered pages.

For inquiries concerning CFR reference assistance, call 202-741-6000 or write to the Director, Office of the Federal Register, National Archives and Records Administration, Washington, DC 20408 or e-mail fedreg.info@nara.gov.

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RAYMOND A. MOSLEY,
Director,
Office of the Federal Register.

January 1, 2006.

THIS TITLE

Title 6—HOMELAND SECURITY is composed of one volume. This volume contains chapter I—Department of Homeland Security, Office of the Secretary. Chapter I contains the current Freedom of Information Act, Privacy Act and Classified National Security Information issued by the Department of Homeland Security. The contents of this volume represent all current regulations codified under this title of the CFR as of January 1, 2006.

For this volume, Ruth Green was Chief Editor. The Code of Federal Regulations publication program is under the direction of Frances D. McDonald, assisted by Alomha S. Morris.

Title 6—Homeland Security

Part

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APPENDIX B TO PART 5—PUBLIC READING ROOMS OF THE DEPARTMENT OF HOMELAND SECURITY

AUTHORITY: Pub. L. 107–296, 116 Stat. 2135; (6 U.S.C. 101 et seq.); 5 U.S.C. 301. Subpart A also issued under 5 U.S.C. 552. Subpart B also issued under 5 U.S.C. 552a.

SOURCE: 68 FR 4056, Jan. 27, 2003, unless otherwise noted.

Subpart A—Freedom of Information Act

§ 5.1 General provisions.

(a)(1) This subpart A contains the rules that the Department of Homeland Security (Department) follows in processing requests for records under the Freedom of Information Act (FOIA) (5 U.S.C. 552). These rules should be read together with the FOIA, which provides additional information about access to records maintained by the Department. Requests made by individuals for records about themselves under the Privacy Act of 1974 (5 U.S.C. 552a), which are processed under subpart B of this part, are processed under this subpart also. Information routinely provided to the public as part of a regular Department activity (for example, press releases issued by the Assistant Secretary for Public Affairs may be provided to the public without following this subpart).

(2) The provisions established by this subpart shall apply to all Department components that are transferred to the Department. Except to the extent a Department component has adopted separate guidance under FOIA, the provisions of this subpart shall apply to each component of the Department. Departmental components may issue their own guidance under this subpart pursuant to approval by the Department.

(b) As used in this subpart, component means each separate bureau, office, board, division, commission, service, or administration of the Department.

§ 5.2 Public reading rooms.

(a) Records that are required to be maintained by the Department in a public reading room will be made available electronically at *www.dhs.gov/foia*. Each Department component will be responsible for determining which of the records it generates are required to be made available and to make those records available either in its own reading room or in the Department's central reading room. Each component shall maintain and make available for public inspection and copying a current subject-matter index of its reading room records. Each index shall be updated regularly, at least quarterly, with respect to newly included records.

(b) The Department components maintain public reading rooms or areas at the locations listed below:

(1) Animal and Plant Health Inspection Service Library, 4700 River Road, Riverdale, MD 20737–1232;

(2) Plum Island Animal Disease Center, the APHIS address above or, USDA-ARS, 5601 Sunnyside Avenue, Building 1, Room 2248, Beltsville, MD 20705–5128;

(3) Critical Infrastructure Assurance Office (A former office of the Bureau of Industry and Security) does not maintain a conventional public reading room. Records that are required to be in the public reading room are available electronically at *http://www.bis.doc.gov/FOIA/Default.htm;*

(4) FIRESTAT (formerly the Integrated Hazard Information System of the National Oceanic and Atmospheric Administration), NOAA Public Reference Facility, 1305 East-West Highway (SSMC4), Room 8627, Silver Spring, MD 20910;

(5) National Communication Service (a former component of the Defense Information Systems Agency) does not maintain a conventional public reading room. Records that are required to be in the public reading room are available electronically at *http://disa.mil/gc/foia/foia.html;*

(6) The address for each component and program listed below is: U.S. Department of Energy; 1000 Independence Avenue, SW., Washington, DC 20585:

(i) Energy Assurance Office;

(ii) Environmental Measurements Laboratory;

(iii) Nuclear Incident Response Team;

(iv) The chemical and biological national security and supporting programs and activities of the non-proliferation and verification research and development program;

(v) The life sciences activities related to microbial pathogens of Biological and Environmental Research Program;

(vi) The nuclear smuggling programs and activities within the proliferation detection program of the non-proliferation and verification research and development program;

(vii) The nuclear assessment program and activities of the assessment, detection, and cooperation program of the international materials protection and cooperation program, and the advanced scientific computing research program and activities at Lawrence Livermore National Laboratory; and

(viii) The National Infrastructure Simulation and Analysis Center;

(7) The address for each component and program listed below is: Freedom of Information Act Officer at: Department of Health and Human Services, Freedom of Information Officer, Room 645–F, Hubert H. Humphrey Building, Independence Avenue, SW., Washington, DC 20201:

(i) Metropolitan Medical Response System;

(ii) National Disaster Medical System;

(8) Office of Emergency Preparedness please contact the Strategic National Stockpile Centers for Disease Control and Agency for Toxic Substances and Disease Registry, 1600 Clifton Road, NE., Room 4103, Building 1, Atlanta, GA 30333;

(9) Immigration and Naturalization Service, 111 Massachusetts Avenue, NW., 2nd Floor, ULLICO Building, Washington, DC 20536;

(10) For the National Infrastructure Protection Center, the National Domestic Preparedness Office, and the Domestic Emergency Support Team: Federal Bureau of Investigation, 935 Pennsylvania Avenue, NW., Department of Justice, Washington, DC 20535–0001;

(11) Office of Domestic Preparedness, U.S. Department of Justice, Office of

Justice Programs, 810 7th Street, NW., Room 5430, Washington, DC 20531;

(12) Visa Office, Department of State, 2201 C Street, NW., Washington, DC 20520;

(13) Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591;

(14) Transportation Security Administration, 400 Seventh Street, SW., Washington, DC 20590;

(15) United States Coast Guard Headquarters, 2100 Second Street, SW., Washington, DC 20593–0001 (for district offices, consult your phone book);

(16) The Federal Law Enforcement Training Center does not maintain a conventional public reading room. Records that are required to be in the public reading room are available electronically at *http://www.fletc.gov/irm/foia/readingroom.htm;*

(17) U.S. Customs Service, Freedom of Information Request, 1300 Pennsylvania Avenue, NW., Mint Annex, Washington, DC 20229–0001 (for a list of field office reading room locations please consult 19 CFR 103.1);

(18) U.S. Secret Service, Main Treasury, Freedom of Information Request, 950 H Street, NW., Suite 3000, Washington, DC;

(19) Federal Emergency Management Agency, Federal Center Plaza, 500 C Street, SW., Room 840, Washington, DC 20472 (for regional offices, consult your phone book);

(20) For the Federal Computer Incident Response Center and the Federal Protective Service: Central Office, GSA Headquarters, 1800 F Street, NW (CAI), Washington, DC 20405 (for regional offices, consult the phone book);

(c) Components shall also make reading room records created by the Department on or after November 1, 1996, available electronically via the component web-site. This includes each component's index of its reading room records, which will indicate which records are available electronically.

§5.3 Requirements for making requests.

(a) *How made and addressed.* You may make a request for records of the Department by writing directly to the Department component that maintains those records. For additional information about the FOIA, you may refer directly to the statute. If you are making a request for records about yourself, see §5.21(d) for additional requirements. If you are making a request for records about another individual, either a written authorization signed by that individual permitting disclosure of those records to you or proof that that individual is deceased (for example, a copy of a death certificate or an obituary) must be submitted. Your request should be sent to the component's FOIA office at the address listed in appendix A to part 5. In most cases, your FOIA request should be sent to a component's central FOIA office. (The functions of each component are summarized elsewhere in this title and in the description of the Department and its components in the ''United States Government Manual,'' which is issued annually and is available in most libraries, as well as for sale from the Government Printing Office's Superintendent of Documents. This manual also can be accessed electronically at the Government Printing Office's World Wide Web site (which can be found at *http://www.access.gpo.gov/su_docs*).) If you cannot determine where within the Department to send your request, you may send it to the Departmental Disclosure Officer, Department of Homeland Security, Washington, DC 20528. That office will forward your request to the component(s) it believes most likely to have the records that you want. Your request will be considered received as of the date it is received by the proper component's FOIA office. For the quickest possible handling, you should mark both your request letter and the envelope ''Freedom of Information Act Request.''

(b) *Description of records sought.* You must describe the records that you seek in enough detail to enable Department personnel to locate them with a reasonable amount of effort. Whenever possible, your request should include specific information about each record sought, such as the date, title or name, author, recipient, and subject matter of the record. If known, you should include any file designations or descriptions for the records that you want. As a general rule, the more specific you

are about the records or type of records that you want, the more likely the Department will be able to locate those records in response to your request. If a component determines that your request does not reasonably describe records, it shall tell you either what additional information is needed or why your request is otherwise insufficient. The component also shall give you an opportunity to discuss your request so that you may modify it to meet the requirements of this section. If your request does not reasonably describe the records you seek, the agency's response to your request may be delayed.

(c) *Agreement to pay fees.* If you make a FOIA request, it shall be considered a firm commitment by you to pay all applicable fees charged under § 5.11 up to $ 25.00, unless you seek a waiver of fees. In making your FOIA request, please indicate whether you are willing to pay for the request or desire a waiver. The component responsible for responding to your request ordinarily will confirm this commitment in an acknowledgement letter. When making a request, you may specify a willingness to pay a greater or lesser amount. If you are seeking a waiver of fees you must provide a justification for your fee waiver request in accordance with the requirements of § 5.11(k). If your request for a fee waiver is denied, the component will notify you of that decision and will request an agreement from you to pay fees up to $25, or a greater or lesser amount specified by you. Your request shall not be considered received and further work shall not be done on it until you agree to pay fees. If you do not provide a firm commitment to pay the anticipated fee within the time period specified by the component, the request will be administratively closed.

§ 5.4 Responsibility for responding to requests.

(a) *In general.* Except as stated in paragraphs (c), (d), and (e) of this section, the component that first receives a request for a record and has possession of that record is the component responsible for responding to the request. In determining which records are responsive to a request, a component ordinarily will include only records in its possession as of the date the component begins its search for them. If any other date is used, the component shall inform the requester of that date.

(b) *Authority to grant or deny requests.* The head of a component, or the component head's designee, is authorized to grant or deny any request for a record of that component.

(c) *Consultations and referrals.* When a component receives a request for a record in its possession, it shall determine whether another component, or another agency of the Federal Government, is better able to determine whether the record is exempt from disclosure under the FOIA and, if so, whether it should be disclosed as a matter of administrative discretion. If the receiving component determines that it is best able to process the record in response to the request, then it shall do so. If the receiving component determines that it is not best able to process the record, then it shall either:

(1) Respond to the request regarding that record, after consulting with the component or agency best able to determine whether to disclose it and with any other component or agency that has a substantial interest in it; or

(2) Refer the responsibility for responding to the request regarding that record to the component best able to determine whether to disclose it, or to another agency that originated the record (but only if that agency is subject to the FOIA). Ordinarily, the component or agency that originated a record will be presumed to be best able to determine whether to disclose it.

(d) *Law enforcement information.* Whenever a request is made for a record containing information that relates to an investigation of a possible violation of law and was originated by another component or agency, the receiving component shall either refer the responsibility for responding to the request regarding that information to that other component or agency or consult with that other component or agency.

(e) *Classified information.* Whenever a request is made for a record containing information that has been classified, or may be appropriate for classification,

by another component or agency under Executive Order 12958 or any other executive order concerning the classification of records, the receiving component shall refer the responsibility for responding to the request regarding that information to the component or agency that classified the information, or which should consider the information for classification, or which has the primary interest in it, as appropriate. Whenever a record contains information that has been derivatively classified by a component because it contains information classified by another component or agency, the component shall refer the responsibility for responding to the request regarding that information to the component or agency that classified the underlying information.

(f) *Notice of referral.* Whenever a component refers all or any part of the responsibility for responding to a request to another component or agency, it ordinarily shall notify the requester of the referral and inform the requester of the name of each component or agency to which the request has been referred and of the part of the request that has been referred.

(g) *Timing of responses to consultations and referrals.* All consultations and referrals will be handled according to the date the FOIA request initially was received by the first component or agency, not any later date.

(h) *Agreements regarding consultations and referrals.* Components may make agreements with other components or agencies to eliminate the need for consultations or referrals for particular types of records.

§5.5 Timing of responses to requests.

(a) *In general.* Components ordinarily shall respond to requests according to their order of receipt.

(b) *Multitrack processing.* (1) A component may use two or more processing tracks by distinguishing between simple and more complex requests based on the amount of work and/or time needed to process the request, including through limits based on the number of pages involved. If a component does so, it shall advise requesters in its slower track(s) of the limits of its faster track(s).

(2) A component using multitrack processing may provide requesters in its slower track(s) with an opportunity to limit the scope of their requests in order to qualify for faster processing within the specified limits of the component's faster track(s). A component doing so will contact the requester either by telephone or by letter, whichever is more efficient in each case.

(c) *Unusual circumstances.* (1) Where the statutory time limits for processing a request cannot be met because of ''unusual circumstances,'' as defined in the FOIA, and the component determines to extend the time limits on that basis, the component shall as soon as practicable notify the requester in writing of the unusual circumstances and of the date by which processing of the request can be expected to be completed. Where the extension is for more than ten working days, the component shall provide the requester with an opportunity either to modify the request so that it may be processed within the time limits or to arrange an alternative time period with the component for processing the request or a modified request.

(2) Where a component reasonably believes that multiple requests submitted by a requester, or by a group of requesters acting in concert, constitute a single request that would otherwise involve unusual circumstances, and the requests involve clearly related matters, they may be aggregated. Multiple requests involving unrelated matters will not be aggregated.

(d) *Expedited processing.* (1) Requests and appeals will be taken out of order and given expedited treatment whenever it is determined that they involve:

(i) Circumstances in which the lack of expedited treatment could reasonably be expected to pose an imminent threat to the life or physical safety of an individual;

(ii) An urgency to inform the public about an actual or alleged federal government activity, if made by a person primarily engaged in disseminating information.

(2) A request for expedited processing may be made at the time of the initial request for records or at any later

time. A request for expedited processing must be submitted to the component that maintains the record requested. Requests based on the categories in paragraphs (d)(1)(i), (ii), and (iii) of this section must be submitted to the component that maintains the records requested.

(3) A requester who seeks expedited processing must submit a statement, certified to be true and correct to the best of that person's knowledge and belief, explaining in detail the basis for requesting expedited processing. For example, a requester within the category in paragraph (d)(1)(ii) of this section, if not a full-time member of the news media, must establish that he or she is a person whose main professional activity or occupation is information dissemination, though it need not be his or her sole occupation. A requester within the category in paragraph (d)(1)(ii) of this section also must establish a particular urgency to inform the public about the government activity involved in the request, beyond the public's right to know about government activity generally. The formality of certification may be waived as a matter of administrative discretion.

(4) Within ten calendar days of its receipt of a request for expedited processing, the proper component shall decide whether to grant it and shall notify the requester of the decision. If a request for expedited treatment is granted, the request shall be given priority and shall be processed as soon as practicable. If a request for expedited processing is denied, any appeal of that decision shall be acted on expeditiously.

§ 5.6 Responses to requests.

(a) *Acknowledgements of requests.* On receipt of a request, a component ordinarily shall send an acknowledgement letter to the requester which shall confirm the requester's agreement to pay fees under § 5.3(c) and provide an assigned request number for further reference.

(b) *Grants of requests.* Ordinarily, a component shall have twenty business days from when a request is received to determine whether to grant or deny the request. Once a component makes a determination to grant a request in whole or in part, it shall notify the requester in writing. The component shall inform the requester in the notice of any fee charged under § 5.11 and shall disclose records to the requester promptly on payment of any applicable fee. Records disclosed in part shall be marked or annotated to show the amount of information deleted unless doing so would harm an interest protected by an applicable exemption. The location of the information deleted also shall be indicated on the record, if technically feasible.

(c) *Adverse determinations of requests.* A component making an adverse determination denying a request in any respect shall notify the requester of that determination in writing. Adverse determinations, or denials of requests, consist of: 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; a determination that a record is not readily reproducible in the form or format sought by the requester; a determination that what has been requested is not a record subject to the FOIA; a determination on any disputed fee matter, including a denial of a request for a fee waiver; and a denial of a request for expedited processing. The denial letter shall be signed by the head of the component, or the component head's designee, and shall include:

(1) The name and title or position of the person responsible for the denial;

(2) A brief statement of the reason(s) for the denial, including any FOIA exemption applied by the component in denying the request;

(3) An estimate of the volume of records or information withheld, in number of pages or in some other reasonable form of estimation. This estimate does not need to be provided if the volume is otherwise indicated through deletions on records disclosed in part, or if providing an estimate would harm an interest protected by an applicable exemption; and

(4) A statement that the denial may be appealed under § 5.9(a) and a description of the requirements of § 5.9(a).

§ 5.7 Classified information.

In processing a request for information that is classified under Executive

Order 12958 (3 CFR, 1996 Comp., p. 333) or any other executive order, the originating component shall review the information to determine whether it should remain classified. Information determined to no longer require classification shall not be withheld on the basis of Exemption 1 of the FOIA. On receipt of any appeal involving classified information, the Associate General Counsel (General Law) shall take appropriate action to ensure compliance with Part 7 of this title.

§5.8 Business information.

(a) *In general.* Business information obtained by the Department from a submitter will be disclosed under the FOIA, if otherwise allowable, only under this section.

(b) *Definitions.* For purposes of this section:

(1) Business information means commercial or financial information obtained by the Department from a submitter that may be protected from disclosure under Exemption 4 of the FOIA.

(2) Submitter means any person or entity from whom the Department obtains business information, directly or indirectly. The term includes, but is not limited to, corporations; state, local, and tribal governments; and foreign governments.

(c) *Designation of business information.* A submitter of business information will use good-faith efforts to designate, by appropriate markings, either at the time of submission or at a reasonable time thereafter, any portions of its submission that it considers to be protected from disclosure under Exemption 4. These designations will expire ten years after the date of the submission unless the submitter requests, and provides justification for, a longer designation period.

(d) *Notice to submitters.* A component shall provide a submitter with prompt written notice of a FOIA request or administrative appeal that seeks its business information wherever required under paragraph (e) of this section, except as provided in paragraph (h) of this section, in order to give the submitter an opportunity to object to disclosure of any specified portion of that information under paragraph (f) of this section. The notice shall either describe the business information requested or include copies of the requested records or record portions containing the information. When notification of a voluminous number of submitters is required, notification may be made by posting or publishing the notice in a place reasonably likely to accomplish it.

(e) *Where notice is required.* Notice shall be given to a submitter wherever:

(1) The information has been designated in good faith by the submitter as information considered protected from disclosure under Exemption 4; or

(2) The component has reason to believe that the information may be protected from disclosure under Exemption 4.

(f) *Opportunity to object to disclosure.* A component will allow a submitter a reasonable time to respond to the notice described in paragraph (d) of this section and will specify that time period within the notice. If a submitter has any objection to disclosure, it is required to submit a detailed written statement. The statement must specify all grounds for withholding any portion of the information under any exemption of the FOIA and, in the case of Exemption 4, it must show why the information is a trade secret or commercial or financial information that is privileged or confidential. In the event that a submitter fails to respond to the notice within the time specified in it, the submitter will be considered to have no objection to disclosure of the information. Information provided by the submitter that is not received by the component until after its disclosure decision has been made shall not be considered by the component. Information provided by a submitter under this paragraph may itself be subject to disclosure under the FOIA.

(g) *Notice of intent to disclose.* A component shall consider a submitter's objections and specific grounds for nondisclosure in deciding whether to disclose business information. Whenever a component decides to disclose business information over the objection of a submitter, the component shall give the submitter written notice, which shall include:

(1) A statement of the reason(s) why each of the submitter's disclosure objections was not sustained;

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

(3) A specified disclosure date, which shall be a reasonable time subsequent to the notice.

(h) *Exceptions to notice requirements.* The notice requirements of paragraphs (d) and (g) of this section shall not apply if:

(1) The component determines that the information should not be disclosed pursuant to exemption four and/or any other exemption of the FOIA;

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

(3) Disclosure of the information is required by statute (other than the FOIA) or by a regulation issued in accordance with the requirements of Executive Order 12600 (3 CFR, 1988 Comp., p. 235); or

(4) The designation made by the submitter under paragraph (c) of this section appears obviously frivolous, except that in such a case the component shall, within a reasonable time prior to a specified disclosure date, give the submitter written notice of any final decision to disclose the information.

(i) *Notice of FOIA lawsuit.* Whenever a requester files a lawsuit seeking to compel the disclosure of business information, the component shall promptly notify the submitter.

(j) *Corresponding notice to requesters.* Whenever a component provides a submitter with notice and an opportunity to object to disclosure under paragraph (d) of this section, the component shall also notify the requester(s). Whenever a component notifies a submitter of its intent to disclose requested information under paragraph (g) of this section, the component shall also notify the requester(s). Whenever a submitter files a lawsuit seeking to prevent the disclosure of business information, the component shall notify the requester(s).

§ 5.9 Appeals.

(a) *Appeals of adverse determinations.* (1) If you are dissatisfied with a component's response to your request, you may appeal an adverse determination denying your request, in any respect, to the Associate General Counsel (General Law), Department of Homeland Security, Washington, DC 20528. You must make your appeal in writing and it must be received by the Associate General Counsel (General Law) within 60 days of the date of the letter denying your request. Your appeal letter may include as much or as little related information as you wish, as long as it clearly identifies the component determination (including the assigned request number, if known) that you are appealing. For the quickest possible handling, you should mark your appeal letter and the envelope ''Freedom of Information Act Appeal.''

(2) An adverse determination by the Associate General Counsel (General Law) will be the final action of the Department; and

(3) An appeal ordinarily will not be acted on if the request becomes a matter of FOIA litigation.

(b) *Responses to appeals.* The decision on your appeal will be made in writing. A decision affirming an adverse determination in whole or in part shall contain a statement of the reason(s) for the affirmance, including any FOIA exemption(s) applied, and will inform you of the FOIA provisions for court review of the decision. If the adverse determination is reversed or modified on appeal, in whole or in part, you will be notified in a written decision and your request will be reprocessed in accordance with that appeal decision.

(c) *When appeal is required.* If you wish to seek review by a court of any adverse determination, you must first appeal it under this section.

§ 5.10 Preservation of records.

Each component shall preserve all correspondence pertaining to the requests that it receives under this subpart, as well as copies of all requested records, until disposition or destruction is authorized by title 44 of the United States Code or the National Archives and Records Administration's General Records Schedule 14. Records will not be disposed of while they are the subject of a pending request, appeal, or lawsuit under the FOIA.

§5.11 Fees.

(a) *In general.* Components shall charge for processing requests under the FOIA in accordance with paragraph (c) of this section, except where fees are limited under paragraph (d) of this section or where a waiver or reduction of fees is granted under paragraph (k) of this section. A component ordinarily shall collect all applicable fees before sending copies of requested records to a requester. Requesters must pay fees by check or money order made payable to the Treasury of the United States.

(b) *Definitions.* For purposes of this section:

(1) Commercial use request means a request from or on behalf of a person who seeks information for a use or purpose that furthers his or her commercial, trade, or profit interests, which can include furthering those interests through litigation. Components shall determine, whenever reasonably possible, the use to which a requester will put the requested records. When it appears that the requester will put the records to a commercial use, either because of the nature of the request itself or because a component has reasonable cause to doubt a requester's stated use, the component shall provide the requester a reasonable opportunity to submit further clarification.

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

(3) Duplication means the making of a copy of a record, or of the information contained in it, necessary to respond to a FOIA request. Copies can take the form of paper, microform, audiovisual materials, or electronic records (for example, magnetic tape or disk), among others. Components shall honor a requester's specified preference of form or format of disclosure if the record is readily reproducible with reasonable efforts in the requested form or format by the office responding to the request.

(4) Educational institution means a preschool, a public or private elementary or secondary school, an institution of undergraduate higher education, an institution of graduate higher education, an institution of professional education, or an institution of vocational education, that operates a program of scholarly research. To be in this category, a requester must show that the request is authorized by and is made under the auspices of a qualifying institution and that the records are not sought for a commercial use but are sought to further scholarly research.

(5) Noncommercial scientific institution means an institution that is not operated on a ''commercial'' basis, as that term is defined in paragraph (b)(1) of this section, and that is operated solely for the purpose of conducting scientific research the results of which are not intended to promote any particular product or industry. To be in this category, a requester must show that the request is authorized by and is made under the auspices of a qualifying institution and that the records are not sought for a commercial use but are sought to further scientific research.

(6) Representative of the news media, or news media requester, means any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public. The term ''news'' means information that is about current events or that would be of current interest to the public. Examples of news media entities include television or radio stations broadcasting to the public at large and publishers of periodicals (but only in those instances where they can qualify as disseminators of ''news'') who make their products available for purchase or subscription by the general public. For ''freelance'' journalists to be regarded as working for a news organization, they must demonstrate a solid basis for expecting publication through that organization. A publication contract would be the clearest proof, but components shall also look to the past publication record of a requester in making

this determination. To be in this category, a requester must not be seeking the requested records for a commercial use. However, a request for records supporting the news-dissemination function of the requester shall not be considered to be for a commercial use.

(7) Review means the examination of a record located in response to a request in order to determine whether any portion of it is exempt from disclosure. It also includes processing any record for disclosure (for example, doing all that is necessary to redact it and prepare it for disclosure). Review costs are recoverable even if a record ultimately is not disclosed. Review time includes time spent considering any formal objection to disclosure made by a business submitter under § 5.8, but does not include time spent resolving general legal or policy issues regarding the application of exemptions.

(8) Search means the process of looking for and retrieving records or information responsive to a request. It includes page-by-page or line-by-line identification of information within records and also includes reasonable efforts to locate and retrieve information from records maintained in electronic form or format. Components shall ensure that searches are done in the most efficient and least expensive manner reasonably possible. For example, components shall not search line-by-line where duplicating an entire document would be quicker and less expensive.

(c) *Fees*. In responding to FOIA requests, components shall charge the following fees unless a waiver or reduction of fees has been granted under paragraph (k) of this section:

(1) *Search*. (i) Search fees shall be charged for all requests other than requests made by educational institutions, noncommercial scientific institutions, or representatives of the news media, subject to the limitations of paragraph (d) of this section. Components may charge for time spent searching even if they do not locate any responsive record or if they withhold the record(s) located as entirely exempt from disclosure.

(ii) Fees for search time are assessed by the hourly wage of the personnel filling the request. These fees are subject to change. Currently, for each quarter hour spent by clerical personnel in searching for and retrieving a requested record, the fee will be $4.00. Where a search and retrieval cannot be performed entirely by clerical personnel (for example, where the identification of records within the scope of a request requires the use of professional personnel) the fee will be $7.00 for each quarter hour of search time spent by professional personnel. Where the time of managerial personnel is required, the fee will be $10.25 for each quarter hour of time spent by those personnel.

(iii) For computer searches of records, requesters will be charged the direct costs of conducting the search, although certain requesters (as provided in paragraph (d)(1) of this section) will be charged no search fee and certain other requesters (as provided in paragraph (d)(3) of this section) will be entitled to the cost equivalent of two hours of manual search time without charge. These direct costs will include the cost of operating a central processing unit for that portion of operating time that is directly attributable to searching for responsive records, as well as the costs of operator/programmer salary apportionable to the search.

(iv) For requests requiring the retrieval of records from any Federal Records Center, certain additional costs may be incurred in accordance with the Transactional Billing Rate Schedule established by the National Archives and Records Administration, effective October 1, 2002.

(2) *Duplication*. Duplication fees will be charged to all requesters, subject to the limitations of paragraph (d) of this section. For a paper photocopy of a record (no more than one copy of which need be supplied), the fee will be ten cents per page. For copies produced by computer, such as tapes or printouts, components will charge the direct costs, including operator time, of producing the copy. For other forms of duplication, components will charge the direct costs of that duplication.

(3) *Review*. Review fees will be charged to requesters who make a commercial use request. Review fees will be charged only for the initial record

review (the review done when a component determines whether an exemption applies to a particular record or record portion at the initial request level). No charge will be made for review at the administrative appeal level for an exemption already applied. However, records or record portions withheld under an exemption that is subsequently determined not to apply may be reviewed again to determine whether any other exemption not previously considered applies; the costs of that review are chargeable where it is made necessary by such a change of circumstances. Review fees will be charged at the same rates as those charged for a search under paragraph (c)(1)(ii) of this section.

(d) *Restrictions on charging fees.* (1) No search fee will be charged for requests by educational institutions, noncommercial scientific institutions, or representatives of the news media.

(2) No search fee or review fee will be charged for a quarter-hour period unless more than half of that period is required for search or review.

(3) Except for requesters seeking records for a commercial use, components will provide without charge:

(i) The first 100 pages of duplication (or the cost equivalent); and

(ii) The first two hours of search (or the cost equivalent).

(4) No fee will be charged whenever a total fee calculated under paragraph (c) of this section is less than the agency's cost to process the check. Currently, whenever a total fee calculated under paragraph (c) of this section is $14.00 or less for any request, no fee will be charged.

(5) The provisions of paragraphs (d)(3) and (d)(4) of this section work together. This means that for requesters other than those seeking records for a commercial use, no fee will be charged unless the cost of search in excess of two hours plus the cost of duplication in excess of 100 pages totals more than $14.00.

(e) *Notice of anticipated fees in excess of $25.00.* When a component determines or estimates that the fees to be charged under this section will amount to more than $25.00, the component shall notify the requester of the actual or estimated amount of the fees, unless the requester has indicated a willingness to pay fees as high as those anticipated. If only a portion of the fee can be estimated readily, the component shall advise the requester that the estimated fee may be only a portion of the total fee. In cases in which a requester has been notified that actual or estimated fees amount to more than $25.00, the request shall not be considered received and further work shall not be done on it until the requester makes a firm commitment to pay the anticipated total fee. Any such agreement should be memorialized by the requester in writing and must be received by the component within a time period specified by the component in its notice to the requester. If the requester does not provide a firm commitment to pay the anticipated fee within the time period specified by the component, the request will be administratively closed. A notice under this paragraph will offer the requester an opportunity to discuss the matter with Department personnel in order to reformulate the request to meet the requester's needs at a lower cost.

(f) *Charges for other services.* Apart from the other provisions of this section, when a component chooses as a matter of administrative discretion to provide a special service (such as certifying that records are true copies or sending them by other than ordinary mail) the direct costs of providing the service ordinarily will be charged.

(g) *Charging interest.* Components may charge interest on any unpaid bill starting on the 31st day following the date of billing the requester. Interest charges will be assessed at the rate provided in 31 U.S.C. 3717 and will accrue from the date of the billing until payment is received by the component. Components will follow the provisions of the Debt Collection Act of 1982 (Pub. L. 97–365, 96 Stat. 1749), as amended, and its administrative procedures, including the use of consumer reporting agencies, collection agencies, and offset.

(h) *Aggregating requests.* Where a component reasonably believes that a requester or a group of requesters acting together is attempting to divide a request into a series of requests for the

purpose of avoiding fees, the component may aggregate those requests and charge accordingly. Components may presume that multiple requests of this type made within a 30-day period have been made in order to avoid fees. Where requests are separated by a longer period, components will aggregate them only where there exists a solid basis for determining that aggregation is warranted under all the circumstances involved. Multiple requests involving unrelated matters will not be aggregated.

(i) *Advance payments.* (1) For requests other than those described in paragraphs (i)(2) and (3) of this section, a component shall not require the requester to make an advance payment before work is begun or continued on a request. Payment owed for work already completed (such as a prepayment before copies are sent to a requester) is not an advance payment.

(2) Where a component determines or estimates that a total fee to be charged under this section will be more than $250.00, it may require the requester to make an advance payment of an amount up to the amount of the entire anticipated fee before beginning to process the request, except where it receives a satisfactory assurance of full payment from a requester that has a history of prompt payment.

(3) Where a requester has previously failed to pay a properly charged FOIA fee to any component or agency within 30 days of the date of billing, a component may require the requester to pay the full amount due, plus any applicable interest, and to make an advance payment of the full amount of any anticipated fee, before the component begins to process a new request or continues to process a pending request from that requester.

(4) In cases in which a component requires advance payment, the request shall not be considered received and further work will not be done on it until the required payment is received.

(j) *Other statutes specifically providing for fees.* The fee schedule of this section does not apply to fees charged under any statute that specifically requires an agency to set and collect fees for particular types of records. Where records responsive to requests are maintained for distribution by agencies operating such statutorily based fee schedule programs, components will inform requesters of the steps for obtaining records from those sources so that they may do so most economically.

(k) *Requirements for waiver or reduction of fees.* (1) Records responsive to a request will be furnished without charge or at a charge reduced below that established under paragraph (c) of this section where a component determines, based on all available information, that the requester has demonstrated that:

(i) Disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government; and

(ii) Disclosure of the information is not primarily in the commercial interest of the requester.

(2) To determine whether the first fee waiver requirement is met, components will consider the following factors:

(i) The subject of the request: Whether the subject of the requested records concerns ''the operations or activities of the government.'' The subject of the requested records must concern identifiable operations or activities of the federal government, with a connection that is direct and clear, not remote or attenuated.

(ii) The informative value of the information to be disclosed: Whether the disclosure is ''likely to contribute'' to an understanding of government operations or activities. The disclosable portions of the requested records must be meaningfully informative about government operations or activities in order to be ''likely to contribute'' to an increased public understanding of those operations or activities. The disclosure of information that already is in the public domain, in either a duplicative or a substantially identical form, would not be as likely to contribute to such understanding where nothing new would be added to the public's understanding.

(iii) The contribution to an understanding of the subject by the public likely to result from disclosure: Whether disclosure of the requested information will contribute to ''public

understanding.'' The disclosure must contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester. A requester's expertise in the subject area and ability and intention to effectively convey information to the public shall be considered. It shall be presumed that a representative of the news media will satisfy this consideration.

(iv) The significance of the contribution to public understanding: Whether the disclosure is likely to contribute ''significantly'' to public understanding of government operations or activities. The public's understanding of the subject in question, as compared to the level of public understanding existing prior to the disclosure, must be enhanced by the disclosure to a significant extent. Components shall not make value judgments about whether information that would contribute significantly to public understanding of the operations or activities of the government is ''important'' enough to be made public.

(3) To determine whether the second fee waiver requirement is met, components will consider the following factors:

(i) The existence and magnitude of a commercial interest: Whether the requester has a commercial interest that would be furthered by the requested disclosure. Components shall consider any commercial interest of the requester (with reference to the definition of ''commercial use'' in paragraph (b)(1) of this section), or of any person on whose behalf the requester may be acting, that would be furthered by the requested disclosure. Requesters shall be given an opportunity in the administrative process to provide explanatory information regarding this consideration.

(ii) The primary interest in disclosure: Whether any identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is ''primarily in the commercial interest of the requester.'' A fee waiver or reduction is justified where the public interest standard is satisfied and that public interest is greater in magnitude than that of any identified commercial interest in disclosure. Components ordinarily shall presume that where a news media requester has satisfied the public interest standard, the public interest will be the interest primarily served by disclosure to that requester. Disclosure to data brokers or others who merely compile and market government information for direct economic return shall not be presumed to primarily serve the public interest.

(4) Where only some of the records to be released satisfy the requirements for a waiver of fees, a waiver shall be granted for those records.

(5) Requests for the waiver or reduction of fees should address the factors listed in paragraphs (k)(2) and (3) of this section, insofar as they apply to each request. Components will exercise their discretion to consider the cost-effectiveness of their investment of administrative resources in this decision-making process, however, in deciding to grant waivers or reductions of fees.

(l) *Payment of outstanding fees.* The Department shall not process a FOIA request from persons with an unpaid fee from any previous FOIA request to any Federal agency until that outstanding fee has been paid in full to the agency.

§5.12 Other rights and services.

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

Subpart B—Privacy Act

§5.20 General provisions.

(a) *Purpose and scope.* (1) This subpart contains the rules that the Department of Homeland Security (Department) follows under the Privacy Act of 1974 (5 U.S.C. 552a). These rules should be read together with the Privacy Act, which provides additional information about records maintained on individuals. The rules in this subpart apply to all

records in systems of records maintained by the Department that are retrieved by an individual's name or personal identifier. They describe the procedures by which individuals may request access to records about themselves, request amendment or correction of those records, and request an accounting of disclosures of those by the Department. In addition, the Department processes all Privacy Act requests for access to records under the Freedom of Information Act (FOIA) (5 U.S.C. 552), following the rules contained in subpart A of this part, which gives requests the benefit of both statutes.

(2) The provisions established by this subpart shall apply to all Department components that are transferred to the Department. Except to the extent a Department component has adopted separate guidance under the Privacy Act, the provisions of this subpart shall apply to each component of the Department. Departmental components may issue their own guidance under this subpart pursuant to approval by the Department.

(b) *Definitions.* As used in this subpart:

(1) Component means each separate bureau, office, board, division, commission, service, or administration of the Department.

(2) Request for access to a record means a request made under Privacy Act subsection (d)(1).

(3) Request for amendment or correction of a record means a request made under Privacy Act subsection (d)(2).

(4) Request for an accounting means a request made under Privacy Act subsection (c)(3).

(5) Requester means an individual who makes a request for access, a request for amendment or correction, or a request for an accounting under the Privacy Act.

(c) *Authority to request records for a law enforcement purpose.* The head of a component or designee thereof is authorized to make written requests under subsection (b)(7) of the Privacy Act for records maintained by other agencies that are necessary to carry out an authorized law enforcement activity.

(d) *Notice on Departmental use of (b)(1) exemption.* As a general matter, when applying the (b)(1) exemption for disclosures within an agency on a need to know basis, the Department will consider itself a single entity, meaning that information may be disclosed between components of the Department under the (b)(1) exemption.

(e) *Interim Retention of Authorities.* As an interim solution, all agencies and components under the Department will retain the necessary authority from their original purpose in order to conduct these necessary activities. This includes the authority to maintain Privacy Act systems of records, disseminate information pursuant to existing or new routine uses, and retention of exemption authorities under sections (j) and (k) of the Privacy Act, where applicable. This retention of an agency or component's authorities and information practices will remain in effect until this regulation is promulgated as a final rule, or the Department revises all systems of records notices. This retention of authority is necessary to allow components to fulfill their mission and purpose during the transition period of the establishment of the Department. During this transition period, the Department shall evaluate with the components the existing authorities and information practices and determine what revisions (if any) are appropriate and should be made to these existing authorities and practices. The Department anticipates that such revisions will be made either through the issuance of a revised system of records notices or through subsequent final regulations.

§ 5.21 Requests for access to records.

(a) *How made and addressed.* You may make a request for access to a Department of Homeland Security record about yourself by appearing in person or by writing directly to the Department component that maintains the record. Your request should be sent or delivered to the component's Privacy Act office at the address listed in appendix A to this part. In most cases, a component's central Privacy Act office is the place to send a Privacy Act request. For records held by a field office

of the U.S. Customs Service, U.S. Secret Service, U.S. Coast Guard, or any other Department component with field offices, however, you must write directly to that Customs, Secret Service, Coast Guard, or other field office address, which can be found in most telephone books or by calling the component's central Privacy Act office. (The functions of each component are summarized elsewhere in this title and in the description of the Department and its components in the ''United States Government Manual,'' which is issued annually and is available in most libraries, as well as for sale from the Government Printing Office's Superintendent of Documents. This manual also can be accessed electronically at the Government Printing Office's World Wide Web site (which can be found at *http://www.access.gpo.gov/su_docs*). Some records are maintained under a government-wide systems of records notice, for example, Official Personnel Files are maintained under the authority of the Office of Personnel Management. In order to access records maintained under a government-wide notice, please send your request to the Privacy Act office of the original department or agency from which the component was transferred to the Department. If you cannot determine where within the Department to send your request, you may send it to the Departmental Disclosure Officer, Department of Homeland Security, Washington, DC 20528, and that office will forward it to the component(s) it believes most likely to have the records that you seek. For the quickest possible handling, you should mark both your request letter and the envelope ''Privacy Act Request.''

(b) *Description of records sought.* You must describe the records that you want in enough detail to enable Department personnel to locate the system of records containing them with a reasonable amount of effort. Whenever possible, your request should describe the records sought, the time periods in which you believe they were compiled, and the name or identifying number of each system of records in which you believe they are kept. The Department publishes notices in the FEDERAL REGISTER that describe its components' systems of records. A description of the Department's systems of records also may be found as part of the ''Privacy Act Compilation'' published by the National Archives and Records Administration's Office of the Federal Register. This compilation is available in most large reference and university libraries. This compilation also can be accessed electronically at the Government Printing Office's World Wide Web site (which can be found at *http://www.access.gpo.gov/su_docs*).

(c) *Agreement to pay fees.* If you make a Privacy Act request for access to records, it shall be considered an agreement by you to pay all applicable fees charged under §5.29, up to $25.00. The component responsible for responding to your request ordinarily shall confirm this agreement in an acknowledgement letter. When making a request, you may specify a willingness to pay a greater or lesser amount.

(d) *Verification of identity.* When you make a request for access to records about yourself, you must verify your identity. You must state your full name, current address, and date and place of birth. You must sign your request and your signature must either be notarized or submitted by you under 28 U.S.C. 1746, a law that permits statements to be made under penalty of perjury as a substitute for notarization. While no specific form is required, you may obtain forms for this purpose from the Departmental Disclosure Officer, Department of Homeland Security, Washington, DC 20528. In order to help the identification and location of requested records, you may also, at your option, include your social security number.

(e) *Verification of guardianship.* When making a request as the parent or guardian of a minor or as the guardian of someone determined by a court to be incompetent, for access to records about that individual, you must establish:

(1) The identity of the individual who is the subject of the record, by stating the name, current address, date and place of birth, and, at your option, the social security number of the individual;

(2) Your own identity, as required in paragraph (d) of this section;

(3) That you are the parent or guardian of that individual, which you may prove by providing a copy of the individual's birth certificate showing your parentage or by providing a court order establishing your guardianship; and

(4) That you are acting on behalf of that individual in making the request.

(f) *Verification in the case of third party information requests.* If you are making a request for records concerning an individual on behalf of that individual, you must provide a statement from the individual verifying the identity of the individual as provided in paragraph (d) of this section. You must also provide a statement from the individual certifying the individual's agreement that records concerning the individual may be released to you.

§ 5.22 Responsibility for responding to requests for access to records.

(a) *In general.* Except as stated in paragraphs (c), (d), and (e) of this section, the component that first receives a request for access to a record, and has possession of that record, is the component responsible for responding to the request. In determining which records are responsive to a request, a component ordinarily shall include only those records in its possession as of the date the component begins its search for them. If any other date is used, the component shall inform the requester of that date.

(b) *Authority to grant or deny requests.* The head of a component, or the component head's designee, is authorized to grant or deny any request for access or amendment to a record of that component.

(c) *Consultations and referrals.* When a component receives a request for access to a record in its possession, it shall determine whether another component, or another agency of the Federal Government, is better able to determine whether the record is exempt from access under the Privacy Act. If the receiving component determines that it is best able to process the record in response to the request, then it shall do so. If the receiving component determines that it is not best able to process the record, then it shall either:

(1) Respond to the request regarding that record, after consulting with the component or agency best able to determine whether the record is exempt from access and with any other component or agency that has a substantial interest in it; or

(2) Refer the responsibility for responding to the request regarding that record to the component best able to determine whether it is exempt from access, or to another agency that originated the record (but only if that agency is subject to the Privacy Act). Ordinarily, the component or agency that originated a record will be presumed to be best able to determine whether it is exempt from access.

(d) *Law enforcement information.* Whenever a request is made for access to a record containing information that relates to an investigation of a possible violation of law and that was originated by another component or agency, the receiving component shall either refer the responsibility for responding to the request regarding that information to that other component or agency or shall consult with that other component or agency.

(e) *Classified information.* Whenever a request is made for access to a record containing information that has been classified by or may be appropriate for classification by another component or agency under Executive Order 12958 or any other executive order concerning the classification of records, the receiving component shall refer the responsibility for responding to the request regarding that information to the component or agency that classified the information, should consider the information for classification, or has the primary interest in it, as appropriate. Whenever a record contains information that has been derivatively classified by a component because it contains information classified by another component or agency, the component shall refer the responsibility for responding to the request regarding that information to the component or agency that classified the underlying information.

(f) *Release of Medical Records.* Pursuant to 5 U.S.C. 552a(f)(3), where requests are made for access to medical records, including psychological

records, the decision to release directly to the individual, or to withhold direct release, shall be made by a medical practitioner. Where the medical practitioner has ruled that direct release will cause harm to the individual who is requesting access, normal release through the individual's chosen medical practitioner will be recommended. Final review and decision on appeals of disapprovals of direct release will rest with the General Counsel.

(g) *Notice of referral.* Whenever a component refers all or any part of the responsibility for responding to a request to another component or agency, it ordinarily shall notify the requester of the referral and inform the requester of the name of each component or agency to which the request has been referred and of the part of the request that has been referred.

(h) *Timing of responses to consultations and referrals.* All consultations and referrals shall be handled according to the date the Privacy Act access request was initially received by the first component or agency, not any later date.

(i) *Agreements regarding consultations and referrals.* Components may make agreements with other components or agencies to eliminate the need for consultations or referrals for particular types of records.

§5.23 Responses to requests for access to records.

(a) *Acknowledgements of requests.* On receipt of a request, a component ordinarily shall send an acknowledgement letter to the requester which shall confirm the requester's agreement to pay fees under §5.21(c) and provide an assigned request number for further reference.

(b) *Grants of requests for access.* Once a component makes a determination to grant a request for access in whole or in part, it shall notify the requester in writing. The component shall inform the requester in the notice of any fee charged under §5.29 and shall disclose records to the requester promptly on payment of any applicable fee. If a request is made in person, the component may disclose records to the requester directly, in a manner not unreasonably disruptive of its operations, on payment of any applicable fee and with a written record made of the grant of the request. If a requester is accompanied by another person, the requester shall be required to authorize in writing any discussion of the records in the presence of the other person.

(c) *Adverse determinations of requests for access.* A component making an adverse determination denying a request for access in any respect shall notify the requester of that determination in writing. Adverse determinations, or denials of requests, consist of: 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; a determination that what has been requested is not a record subject to the Privacy Act; a determination on any disputed fee matter; and a denial of a request for expedited treatment. The notification letter shall be signed by the head of the component, or the component head's designee, and shall include:

(1) The name and title or position of the person responsible for the denial;

(2) A brief statement of the reason(s) for the denial, including any Privacy Act exemption(s) applied by the component in denying the request; and

(3) A statement that the denial may be appealed under §5.25(a) and a description of the requirements of §5.25(a).

§5.24 Classified information.

In processing a request for access to a record containing information that is classified under Executive Order 12958 or any other executive order, the originating component shall review the information to determine whether it should remain classified. Information determined to no longer require classification shall not be withheld from a requester on the basis of Exemption (k)(1) of the Privacy Act. On receipt of any appeal involving classified information, the Associate General Counsel (General Law), shall take appropriate action to ensure compliance with Part 7 of this title.

§5.25 Appeals.

(a) *Appeals.* If you are dissatisfied with a component's response to your request for access to records, you may

appeal an adverse determination denying your request in any respect to the Associate General Counsel (General Law), Department of Homeland Security, Washington, DC 20528. You must make your appeal in writing and it must be received by the Associate General Counsel (General Law) within 60 days of the date of the letter denying your request. Your appeal letter may include as much or as little related information as you wish, as long as it clearly identifies the component determination (including the assigned request number, if known) that you are appealing. For the quickest possible handling, you should mark both your appeal letter and the envelope ''Privacy Act Appeal.''

(b) *Responses to appeals.* The decision on your appeal will be made in writing. A decision affirming an adverse determination in whole or in part will include a brief statement of the reason(s) for the affirmance, including any Privacy Act exemption applied, and will inform you of the Privacy Act provisions for court review of the decision. If the adverse determination is reversed or modified on appeal in whole or in part, you will be notified in a written decision and your request will be reprocessed in accordance with that appeal decision. An adverse determination by the Associate General Counsel (General Law) will be the final action of the Department.

(c) *When appeal is required.* If you wish to seek review by a court of any adverse determination or denial of a request, you must first appeal it under this section. An appeal will not be acted on if the request becomes a matter of litigation.

§ 5.26 Requests for amendment or correction of records.

(a) *How made and addressed.* Unless the record is not subject to amendment or correction as stated in paragraph (f) of this section, you may make a request for amendment or correction of a record of the Department about you by writing directly to the Department component that maintains the record, following the procedures in § 5.21. Your request should identify each particular record in question, state the amendment or correction that you want, and state why you believe that the record is not accurate, relevant, timely, or complete. You may submit any documentation that you think would be helpful. If you believe that the same record is in more than one system of records, you should state that and address your request to each component that maintains a system of records containing the record.

(b) *Component responses.* Within ten working days of receiving your request for amendment or correction of records, a component shall send you a written acknowledgment of its receipt of your request, and it shall promptly notify you whether your request is granted or denied. If the component grants your request in whole or in part, it shall describe the amendment or correction made and shall advise you of your right to obtain a copy of the corrected or amended record, in disclosable form. If the component denies your request in whole or in part, it shall send you a letter signed by the head of the component, or the component head's designee, that shall state:

(1) The reason(s) for the denial; and

(2) The procedure for appeal of the denial under paragraph (c) of this section, including the name and business address of the official who will act on your appeal.

(c) *Appeals.* You may appeal a denial of a request for amendment or correction to the Associate General Counsel (General Law) in the same manner as a denial of a request for access to records (see § 5.25) and the same procedures shall be followed. If your appeal is denied, you shall be advised of your right to file a Statement of Disagreement as described in paragraph (d) of this section and of your right under the Privacy Act for court review of the decision.

(d) *Statements of Disagreement.* If your appeal under this section is denied in whole or in part, you have the right to file a Statement of Disagreement that states your reason(s) for disagreeing with the Department's denial of your request for amendment or correction. Statements of Disagreement must be concise, must clearly identify each part of any record that is disputed, and should be no longer than one typed page for each fact disputed. Your

Statement of Disagreement must be sent to the component involved, which shall place it in the system of records in which the disputed record is maintained and shall mark the disputed record to indicate that a Statement of Disagreement has been filed and where in the system of records it may be found.

(e) *Notification of amendment/correction or disagreement.* Within 30 working days of the amendment or correction of a record, the component that maintains the record shall notify all persons, organizations, or agencies to which it previously disclosed the record, if an accounting of that disclosure was made, that the record has been amended or corrected. If an individual has filed a Statement of Disagreement, the component shall append a copy of it to the disputed record whenever the record is disclosed and may also append a concise statement of its reason(s) for denying the request to amend or correct the record.

(f) *Records not subject to amendment or correction.* The following records are not subject to amendment or correction:

(1) Transcripts of testimony given under oath or written statements made under oath;

(2) Transcripts of grand jury proceedings, judicial proceedings, or quasi-judicial proceedings, which are the official record of those proceedings;

(3) Presentence records that originated with the courts; and

(4) Records in systems of records that have been exempted from amendment and correction under Privacy Act (5 U.S.C. 552a(j) or (k)) by notice published in the FEDERAL REGISTER.

§ 5.27 Requests for an accounting of record disclosures.

(a) *How made and addressed.* Except where accountings of disclosures are not required to be kept (as stated in paragraph (b) of this section), you may make a request for an accounting of any disclosure that has been made by the Department to another person, organization, or agency of any record about you. This accounting contains the date, nature, and purpose of each disclosure, as well as the name and address of the person, organization, or agency to which the disclosure was made. Your request for an accounting should identify each particular record in question and should be made by writing directly to the Department component that maintains the record, following the procedures in § 5.21.

(b) *Where accountings are not required.* Components are not required to provide accountings to you where they relate to:

(1) Disclosures for which accountings are not required to be kept, such as disclosures that are made to employees within the agency and disclosures that are made under the FOIA;

(2) Disclosures made to law enforcement agencies for authorized law enforcement activities in response to written requests from those law enforcement agencies specifying the law enforcement activities for which the disclosures are sought; or

(3) Disclosures made from law enforcement systems of records that have been exempted from accounting requirements.

(c) *Appeals.* You may appeal a denial of a request for an accounting to the Associate General Counsel (General Law) in the same manner as a denial of a request for access to records (see § 5.25) and the same procedures will be followed.

§ 5.28 Preservation of records.

Each component will preserve all correspondence pertaining to the requests that it receives under this subpart, as well as copies of all requested records, until disposition or destruction is authorized by title 44 of the United States Code or the National Archives and Records Administration's General Records Schedule 14. Records will not be disposed of while they are the subject of a pending request, appeal, or lawsuit under the Act.

§ 5.29 Fees.

(a) Components shall charge fees for duplication of records under the Privacy Act in the same way in which they charge duplication fees under § 5.11.

(b) The Department shall not process a request under the Privacy Act from persons with an unpaid fee from any previous Privacy Act request to any

Federal agency until that outstanding fee has been paid in full to the agency.

§ 5.30 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 component shall make reasonable efforts to provide notice of this to the individual. Notice shall be given within a reasonable time after the component's receipt of the order, except that in a case in which the order is not a matter of public record, the notice shall be given only after the order becomes public. This 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. Notice shall not be given if disclosure is made from a criminal law enforcement system of records that has been exempted from the notice requirement.

(b) *Emergency disclosures.* Upon disclosing a record pertaining to an individual made under compelling circumstances affecting health or safety, the component shall notify that individual of the disclosure. This notice shall be mailed to the individual's last known address and shall state the nature of the information disclosed; the person, organization, or agency to which it was disclosed; the date of disclosure; and the compelling circumstances justifying the disclosure.

§ 5.31 Security of systems of records.

(a) *In general.* Each component shall establish administrative and physical controls to prevent unauthorized access to its systems of records, to prevent unauthorized disclosure of records, and to prevent physical damage to or destruction of records. The stringency of these controls shall correspond to the sensitivity of the records that the controls protect. At a minimum, each component's administrative and physical controls shall ensure that:

(1) Records are protected from public view;

(2) The area in which records are kept is supervised during business hours to prevent unauthorized persons from having access to them;

(3) Records are inaccessible to unauthorized persons outside of business hours; and

(4) Records are not disclosed to unauthorized persons or under unauthorized circumstances in either oral or written form.

(b) *Procedures required.* Each component shall have procedures that restrict access to records to only those individuals within the Department who must have access to those records in order to perform their duties and that prevent inadvertent disclosure of records.

§ 5.32 Contracts for the operation of record systems.

Under 5 U.S.C. 552a(m), any approved contract for the operation of a record system will contain the standard contract requirements issued by the General Services Administration to ensure compliance with the requirements of the Privacy Act for that record system. The contracting component will be responsible for ensuring that the contractor complies with these contract requirements.

§ 5.33 Use and collection of social security numbers.

Each component shall ensure that employees authorized to collect information are aware:

(a) That individuals may not be denied any right, benefit, or privilege as a result of refusing to provide their social security numbers, unless the collection is authorized either by a statute or by a regulation issued prior to 1975; and

(b) That individuals requested to provide their social security numbers must be informed of:

(1) Whether providing social security numbers is mandatory or voluntary;

(2) Any statutory or regulatory authority that authorizes the collection of social security numbers; and

(3) The uses that will be made of the numbers.

§ 5.34 Standards of conduct for administration of the Privacy Act.

Each component will inform its employees of the provisions of the Privacy Act, including the Act's civil liability and criminal penalty provisions. Unless

otherwise permitted by law, the Department shall:

(a) Collect from individuals only the information that is relevant and necessary to discharge the responsibilities of the Department;

(b) Collect information about an individual directly from that individual whenever practicable and when the information may result in adverse determinations about an individual's rights, benefits, and privileges under federal programs;

(c) Inform each individual from whom information is collected of:

(1) The legal authority to collect the information and whether providing it is mandatory or voluntary;

(2) The principal purpose for which the Department intends to use the information;

(3) The routine uses the Department may make of the information; and

(4) The effects on the individual, if any, of not providing the information;

(d) Ensure that the component maintains no system of records without public notice and that it notifies appropriate Department officials of the existence or development of any system of records that is not the subject of a current or planned public notice;

(e) Maintain all records that are used by the Department in making any determination about an individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to ensure fairness to the individual in the determination;

(f) Except as to disclosures made to an agency or made under the FOIA, make reasonable efforts, prior to disseminating any record about an individual, to ensure that the record is accurate, relevant, timely, and complete;

(g) Maintain no record describing how an individual exercises his or her First Amendment rights, unless it is expressly authorized by statute or by the individual about whom the record is maintained, or is pertinent to and within the scope of an authorized law enforcement activity;

(h) When required by the Privacy Act, maintain an accounting in the specified form of all disclosures of records by the Department to persons, organizations, or agencies;

(i) Maintain and use records with care to prevent the unauthorized or inadvertent disclosure of a record to anyone.

§5.35 Sanctions and penalties.

Under the provisions of the Privacy Act, 5 U.S.C. 552a, civil and criminal penalties may be assessed.

§5.36 Other rights and services.

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

Subpart C—Disclosure of Information in Litigation

SOURCE: 68 FR 4070, Jan. 27, 2003, unless otherwise noted.

§5.41 Purpose and scope; definitions.

(a) This subpart C sets forth the procedures to be followed with respect to:

(1) Service of summonses and complaints or other requests or demands directed to the Department of Homeland Security (Department) or to any Department employee or former employee in connection with federal or state litigation arising out of or involving the performance of official activities of the Department; and

(2) The oral or written disclosure, in response to subpoenas, orders, or other requests or demands of federal or state judicial or quasi-judicial or administrative authority as well as state legislative authorities (collectively, ''demands''), whether civil or criminal in nature, or in response to requests for depositions, affidavits, admissions, responses to interrogatories, document production, interviews, or other litigation-related matters, including pursuant to the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, or applicable state rules (collectively, ''requests''), of any material contained in the files of the Department, any information relating to material contained in the files of the Department, or any information acquired while the subject of the demand or request is or was employed by the Department, or served as Secretary of

the Department, as part of the performance of that person's duties or by virtue of that person's official status.

(b) The provisions established by this subpart shall apply to all Department components that are transferred to the Department. Except to the extent a Department component has adopted separate guidance governing the subject matter of a provision of this subpart, the provisions of this subpart shall apply to each component of the Department. Departmental components may issue their own guidance under this subpart subject to the approval of the General Counsel of the Department.

(c) For purposes of this subpart, and except as the Department may otherwise determine in a particular case, the term employee includes all former Secretaries of Homeland Security and all employees of the Department of Homeland Security or other federal agencies who are or were appointed by, or subject to the supervision, jurisdiction, or control of the Secretary of Homeland Security, whether residing or working in the United States or abroad, including United States nationals, foreign nationals, and contractors. The procedures established within this subpart also apply to former employees of the Department where specifically noted.

(d) For purposes of this subpart, the term litigation encompasses all pretrial, trial, and post-trial stages of all judicial or administrative actions, hearings, investigations, or similar proceedings before courts, commissions, boards (including the Board of Appellate Review), grand juries, or other judicial or quasi-judicial bodies or tribunals, whether criminal, civil, or administrative in nature. This subpart governs, *inter alia*, responses to discovery requests, depositions, and other pre-trial, trial, or post-trial proceedings, as well as responses to informal requests by attorneys or others in situations involving litigation. However, this subpart shall not apply to any claims against the Department by Department of Homeland Security employees (present or former), or applicants for Department employment, for which jurisdiction resides with the U.S. Equal Employment Opportunity Commission; the U.S. Merit Systems Protection Board; the Office of Special Counsel; the Federal Labor Relations Authority; the Foreign Service Labor Relations Board; the Foreign Service Grievance Board; or a labor arbitrator operating under a collective bargaining agreement between the Department and a labor organization representing Department employees; or their successor agencies or entities.

(e) For purposes of this subpart, official information means all information of any kind, however stored, that is in the custody and control of the Department, relates to information in the custody and control of the Department, or was acquired by Department employees, or former employees, as part of their official duties or because of their official status within the Department while such individuals were employed by or served on behalf of the Department.

(f) Nothing in this subpart affects disclosure of information under the Freedom of Information Act (FOIA), 5 U.S.C. 552, the Privacy Act, 5 U.S.C. 552a, Executive Order 12958 on national security information (3 CFR, 1995 Comp., p. 333), the Government in the Sunshine Act, 5 U.S.C. 552b, the Department's implementing regulations or pursuant to congressional subpoena. Nothing in this subpart permits disclosure of information by the Department, its present and former employees, or the Secretary, that is protected or prohibited by statute or other applicable law.

(g) This subpart is intended only to inform the public about Department procedures concerning the service of process and responses to demands or requests and is not intended to and does not create, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by a party against the Department or the United States.

(h) Nothing in this subpart affects the rules and procedures, under applicable U.S. law and international conventions, governing diplomatic and consular immunity.

(i) Nothing in this subpart affects the disclosure of official information to other federal agencies or Department of Justice attorneys in connection with litigation conducted on behalf or in defense of the United States, its agencies,

officers, and employees, or litigation in which the United States has an interest; or to federal, state, local, or foreign prosecuting and law enforcement authorities in conjunction with criminal law enforcement investigations, prosecutions, or other proceedings, *e.g.*, extradition, deportation.

§5.42 Service of summonses and complaints.

(a) Only the Office of the General Counsel is authorized to receive and accept on behalf of the Department summonses or complaints sought to be served upon the Department, the Secretary, or Department employees. All such documents should be delivered or addressed to the Office of the General Counsel, United States Department of Homeland Security, Washington, DC, 20258. The authorization for receipt shall in no way affect the requirements of service elsewhere provided in applicable rules and regulations.

(b) In the event any summons or complaint described in §5.41(a) is delivered to an employee of the Department other than in the manner specified in this part, the recipient thereof shall decline to accept the proffered service and may notify the person attempting to make service of the Departmental regulations set forth herein.

(c) Except as otherwise provided §§5.42(d) and 5.43(c), the Department is not an authorized agent for service of process with respect to civil litigation against Department employees purely in their personal, non-official capacity. Copies of summonses or complaints directed to Department employees in connection with legal proceedings arising out of the performance of official duties may, however, be served upon the Office of the General Counsel.

(d) Although the Department is not an agent for the service of process upon its employees with respect to purely personal, non-official litigation, the Department recognizes that its employees should not use their official positions to evade their personal obligations and will, therefore, counsel and encourage Department employees to accept service of process in appropriate cases.

(e) Documents for which the Office of the General Counsel accepts service in official capacity only shall be stamped ''Service Accepted in Official Capacity Only''. Acceptance of service shall not constitute an admission or waiver with respect to jurisdiction, propriety of service, improper venue, or any other defense in law or equity available under applicable laws or rules.

§5.43 Service of subpoenas, court orders, and other demands or requests for official information or action.

(a) Except in cases in which the Department is represented by legal counsel who have entered an appearance or otherwise given notice of their representation, only the Office of the General Counsel is authorized to receive and accept subpoenas, or other demands or requests directed to the Secretary, the Department, or any component thereof, or its employees, whether civil or criminal in nature, for:

(1) Material, including documents, contained in the files of the Department;

(2) Information, including testimony, affidavits, declarations, admissions, responses to interrogatories, or informal statements, relating to material contained in the files of the Department or which any Department employee acquired in the course and scope of the performance of his official duties;

(3) Garnishment or attachment of compensation of current or former employees; or

(4) The performance or non-performance of any official Department duty.

(b) In the event that any subpoena, demand, or request is sought to be delivered to a Department employee other than in the manner prescribed in paragraph (a) of this section, such employee shall, after consultation with the Office of the General Counsel, decline service and direct the server of process to the Departmental regulations. If the subpoena, demand, or other request is nonetheless delivered to the employee, the employee shall immediately forward a copy of that document to the Office of the General Counsel.

(c) Except as otherwise provided in this subpart, the Department is not an

agent for service, or otherwise authorized to accept on behalf of its employees, any subpoenas, show-cause orders, or similar compulsory process of federal or state courts, or requests from private individuals or attorneys, which are not related to the employees' official duties except upon the express, written authorization of the individual Department employee to whom such demand or request is directed.

(d) Acceptance of such documents by the Office of the General Counsel does not constitute a waiver of any defenses that might otherwise exist with respect to service under the Federal Rules of Civil or Criminal Procedure or other applicable rules.

(e) Copies of any subpoenas, show cause orders, or similar compulsory process of federal or state courts, or requests from private individuals or attorneys, directed to former employees of the Department in connection with legal proceedings arising out of the performance of official duties shall also be served upon the Office of the General Counsel. The Department shall not, however, serve as an agent for service for the former employee, nor is the Department otherwise authorized to accept service on behalf of its former employees. If the demand involves their official duties, former employees who receive subpoenas, show cause orders, or similar compulsory process of federal or state courts should also notify in the component of the Department in which they were employed if the service involves their official duties while so employed.

(f) If the subpoena, demand, or other request is nonetheless delivered to the employee, the employee shall immediately forward a copy of that document to the Office of the General Counsel.

§ 5.44 Testimony and production of documents prohibited unless approved by appropriate Department officials.

(a) No employee, or former employee, of the Department shall, in response to a demand or request, including in connection with any litigation, provide oral or written testimony by deposition, declaration, affidavit, or otherwise concerning any information acquired while such person is or was an employee of the Department as part of the performance of that person's official duties or by virtue of that person's official status, unless authorized to do so by the Office of the General Counsel, or as authorized in § 5.44(b).

(b) No employee, or former employee, shall, in response to a demand or request, including in connection with any litigation, produce any document or any material acquired as part of the performance of that employee's duties or by virtue of that employee's official status, unless authorized to do so by the Office of the General Counsel or the delegates thereof, as appropriate.

§ 5.45 Procedure when testimony or production of documents is sought; general.

(a) If official information is sought, through testimony or otherwise, by a request or demand, the party seeking such release or testimony must (except as otherwise required by federal law or authorized by the Office of the General Counsel) set forth in writing, and with as much specificity as possible, the nature and relevance of the official information sought. Where documents or other materials are sought, the party should provide a description using the types of identifying information suggested in § 5.3(b). Subject to § 5.47, Department employees may only produce, disclose, release, comment upon, or testify concerning those matters which were specified in writing and properly approved by the appropriate Department official designated in § 5.44. *See United States ex rel. Touhy* v. *Ragen*, 340 U.S. 462 (1951). The Office of the General Counsel may waive the requirement of this subsection in appropriate circumstances.

(b) To the extent it deems necessary or appropriate, the Department may also require from the party seeking such testimony or documents a plan of all reasonably foreseeable demands, including but not limited to the names of all employees and former employees from whom discovery will be sought, areas of inquiry, expected duration of proceedings requiring oral testimony, and identification of potentially relevant documents.

(c) The appropriate Department official designated in §5.42 will notify the Department employee and such other persons as circumstances may warrant of its decision regarding compliance with the request or demand.

(d) The Office of the General Counsel will consult with the Department of Justice regarding legal representation for Department employees in appropriate cases.

§5.46 Procedure when response to demand is required prior to receiving instructions.

(a) If a response to a demand is required before the appropriate Department official designated in §5.44 renders a decision, the Department, if necessary, will request that the Department of Justice or the appropriate Department attorney take appropriate steps to stay, postpone, or obtain relief from the demand pending decision. If necessary, the attorney will:

(1) Appear with the employee upon whom the demand has been made;

(2) Furnish the court or other authority with a copy of the regulations contained in this subpart;

(3) Inform the court or other authority that the demand has been, or is being, as the case may be, referred for the prompt consideration of the appropriate Department official; and

(4) Respectfully request the court or authority to stay the demand pending receipt of the requested instructions.

(b) In the event that an immediate demand for production or disclosure is made in circumstances which would preclude the proper designation or appearance of a Department of Justice or appropriate Department attorney on the employee's behalf, the employee, if necessary, shall respectfully request from the demanding court or authority for a reasonable stay of proceedings for the purpose of obtaining instructions from the Department.

§5.47 Procedure in the event of an adverse ruling.

If a stay of, or other relief from, the effect of the demand in response to a request made pursuant to §5.46 is declined or not obtained, or if the court or other judicial or quasi-judicial authority declines to stay the effect of the demand in response to a request made pursuant to §5.46, or if the court or other authority rules that the demand must be complied with irrespective of the Department's instructions not to produce the material or disclose the information sought, the employee upon whom the demand has been made shall respectfully decline to comply with the demand, citing this subpart and *United States ex rel. Touhy* v. *Ragen*, 340 U.S. 462 (1951).

§5.48 Considerations in determining whether the Department will comply with a demand or request

(a) In deciding whether to comply with a demand or request, Department officials and attorneys shall consider, among any other pertinent considerations:

(1) Whether such compliance would be unduly burdensome or otherwise inappropriate under the applicable rules of discovery or the rules of procedure governing the case or matter in which the demand arose;

(2) Whether compliance is appropriate under the relevant substantive law concerning privilege or disclosure of information;

(3) The public interest;

(4) The need to conserve the time of Department employees for the conduct of official business;

(5) The need to avoid spending the time and money of the United States for private purposes;

(6) The need to maintain impartiality between private litigants in cases where a substantial government interest is not implicated;

(7) Whether compliance would have an adverse effect on performance by the Department of its mission and duties; and

(8) The need to avoid involving the Department in controversial issues not related to its mission.

(b) Among those demands and requests in response to which compliance will not ordinarily be authorized are those with respect to which any of the following factors, *inter alia*, exist:

(1) Compliance would violate a statute or a rule of procedure;

(2) Compliance would violate a specific regulation or Executive order;

(3) Compliance would reveal information properly classified in the interest of national security;

(4) Compliance would reveal confidential commercial or financial information or trade secrets without the owner's consent;

(5) Compliance would reveal the internal deliberative processes of the Executive Branch; or

(6) Compliance would potentially impede or prejudice an on-going law enforcement investigation.

§ 5.49 Prohibition on providing expert or opinion testimony.

(a) Except as provided in this section, and subject to 5 CFR 2635.805, Department employees shall not provide opinion or expert testimony based upon information which they acquired in the scope and performance of their official Department duties, except on behalf of the United States or a party represented by the Department of Justice.

(b) Any expert or opinion testimony by a former employee of the Department shall be excepted from 5.49(a) where the testimony involves only general expertise gained while employed at the Department.

(c) Upon a showing by the requestor of exceptional need or unique circumstances and that the anticipated testimony will not be adverse to the interests of the United States, the appropriate Department official designated in § 5.44 may, consistent with 5 CFR 2635.805, in their discretion and with the concurrence of the Office of the General Counsel, grant special, written authorization for Department employees, or former employees, to appear and testify as expert witnesses at no expense to the United States.

(d) If, despite the final determination of the appropriate Department official designated in § 5.44, a court of competent jurisdiction or other appropriate authority orders the appearance and expert or opinion testimony of a current or former Department employee, that person shall immediately inform the Office of the General Counsel of such order. If the Office of the General Counsel determines that no further legal review of or challenge to the court's order will be made, the Department employee, or former employee, shall comply with the order. If so directed by the Office of the General Counsel, however, the employee, or former employee, shall respectfully decline to testify.

APPENDIX A TO PART 5—FOIA/PRIVACY ACT OFFICES OF THE DEPARTMENT OF HOMELAND SECURITY

I. For the following Headquarters components of the Department of Homeland Security, FOIA and Privacy Act requests should be sent to the Departmental Disclosure Office, Department of Homeland Security, Washington, DC 20528. The Headquarters components are:

A

Office of the Secretary
Office of the Deputy Secretary
Office of the Under Secretary for Management

B

Office of the General Counsel
Office of the Inspector General
Office of International Affairs
Office of Legislative Affairs
Office of Public Affairs
Office of National Capital Region Coordination
Office of Professional Responsibility
Office for State and Local Government Coordination

C

Directorate of Border and Transportation Security
Directorate of Emergency Preparedness and Response
Directorate of Information Analysis and Infrastructure Protection
Directorate of Science and Technology

II. Requests made to components that have transferred or will transfer into the Department of Homeland Security, should be sent as follows:

A. Former components of the Department of Agriculture:

1. Animal and Plant Health Inspection Service, USDA, APHIS, LPA, FOIA, 4700 River Road, Unit 50, Riverdale, MD 20737–1232
2. Plum Island Animal Disease Center; Submit request to the APHIS address above or, FOIA Coordinator, USDA-REE-ARS-Information Staff, 5601 Sunnyside Avenue, Bldg. 1, Room 2248, Mail Stop 5128, Beltsville, MD 20705–5128

B. Former components of the Department of Commerce:

1. Critical Infrastructure Assurance Office (A former office of the Bureau of Industry and Security); Freedom of Information Coordinator, Bureau of Industry and Security,

Room 6883, U.S. Department of Commerce, Washington, DC 20230

2. FIRESTAT (formerly the Integrated Hazard Information System of the National Oceanic and Atmospheric Administration), National Oceanic and Atmospheric Administration, Public Reference Facility (OFAx2), 1315 East-West Highway (SSMC3), Room 10703, Silver Spring, MD 20910

C. Former components of the Department of Defense:

1. National Communications Service (A former component of the Defense Information Systems Agency), Defense Information Systems Agency, ATTN: RGC/FOIA Officer, 701 S. Courthouse Rd., Arlington, VA 22204–2199

D. Former components and programs of the Department of Energy:

The address for each component and program listed below is: U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585

1. Energy Assurance Office

2. Environmental Measurements Laboratory

3. Nuclear Incident Response Team

4. The chemical and biological national security and supporting programs and activities of the non-proliferation and verification research and development program.

5. The life sciences activities related to microbial pathogens of Biological and Environmental Research Program.

6. The nuclear smuggling programs and activities within the proliferation detection program of the non-proliferation and verification research and development program.

7. The nuclear assessment program and activities of the assessment, detection, and cooperation program of the international materials protection and cooperation program, and the advanced scientific computing research program and activities at Lawrence Livermore National Laboratory.

8. National Infrastructure Simulation and Analysis Center

E. Former components of the Department of Health and Human Services:

1. The address for each component and program listed below is: Department of Health and Human Services, Freedom of Information Officer, Room 645–F, Hubert H. Humphrey Building, Independence Avenue, SW., Washington, DC 20201;

a. Metropolitan Medical Response System,

b. National Disaster Medical System, and

c. Office of Emergency Preparedness

d. Strategic National Stockpile

2. Centers for Disease Control and Agency for Toxic Substances and Disease Registry, Attn: FOI Office, MS-D54, 1600 Clifton Road, NE., Atlanta, GA 30333.

F. Former components of the Department of Justice:

1. Immigration and Naturalization Service, Director, Freedom of Information/Privacy Act Program, Department of Justice, 425 Eye Street, NW., 2nd Floor, ULLICO Building, Washington, DC 20536 (for field offices, consult your phone book).

2. The address for each component and program listed below is: Federal Bureau of Investigation, Chief, FOIPA Section, 935 Pennsylvania Avenue, NW., Department of Justice, Washington, DC 20535–0001;

a. National Infrastructure Protection Center,

b. National Domestic Preparedness Office, and

c. Domestic Emergency Support Team.

3. Office of Domestic Preparedness, U.S. Department of Justice, Office of Justice Programs, Office of the General Counsel, Attention: FOIA Staff, 810 7th Street, NW., Room 5400, Washington, DC 20531.

G. Former components of the Department of State:

Visa Office, Information and Privacy Coordinator, Office of Information Resources, Management Programs and Services, A/RPS/IPS, SA–2, Department of State, Washington, DC 20522–6001, Re: Freedom of Information Act Request.

H. Former components of the Department of Transportation:

1. Federal Aviation Administration, National Freedom of Information Act Staff, ARC–40, 800 Independence Avenue, SW., Washington, DC 20591 (for regional centers, consult your phone book).
2. Transportation Security Administration, TSA–1, FOIA Division, 400 Seventh Street, SW., Washington, DC 20590
3. United States Coast Guard, HQ USCG Commandant, G-CIM, 2100 Second Street, SW., Washington, DC 20593–0001 (for district offices, consult your phone book).

I. Former components of the Department of Treasury:

1. Federal Law Enforcement Training Center, Freedom of Information Act Officer, Townhouse 389, Glynco, GA 31524
2. U.S. Customs Service, Freedom of Information Act Request, Mint Annex, 1300 Pennsylvania Avenue, NW., Washington, DC 20229 (for field offices, consult your phone book).
3. U.S. Secret Service, Freedom of Information Act Request, 950 H Street, NW., Suite 3000, Washington, DC 20223, e-mail *FOIA@USSS.Treas.gov*. Appeals should be addressed to the Deputy Director, United States Secret Service, Freedom of Information and Privacy Act Appeal Officer, at these same contact points.

J. Federal Emergency Management Agency: Federal Emergency Management Agency, Office of General Counsel, 500 C Street, SW., Room 840, Washington, DC 20472 (for regional offices, consult your phone book).

K. Former components of the General Services Administration:

1. For the Federal Computer Incident Response Center and the Federal Protective Service: Chief, FOIA Information Management Branch, GSA (CAIM), 1800 F Street, NW., Washington, DC 20405 (for regional offices, consult your phone book).

APPENDIX B TO PART 5—PUBLIC READING ROOMS OF THE DEPARTMENT OF HOMELAND SECURITY

The Headquarters components of the Department of Homeland Security do not maintain a conventional public reading room. Records that are required to be in the public reading room are available electronically at *http://www.dhs.gov/FOIA*.

Entities that will transfer into the Department of Homeland Security maintain public reading rooms as follows:

1. Former components of the Department of Agriculture:

Animal and Plant Health Inspection Service Library, 4700 River Road, Riverdale, MD 20737–1232

Plum Island Animal Disease Center, the APHIS address above or, USDA-ARS, 5601 Sunnyside Avenue, Building 1, Room 2248, Beltsville, MD 20705–5128

2. Former components of the Department of Commerce:

The Critical Infrastructure Assurance Office (A former office of the Bureau of Industry and Security) does not maintain a conventional public reading room. Records that are required to be in the public reading room are available electronically at *http://www.bis.doc.gov/FOIA/Default.htm*

FIRESTAT (formerly the Integrated Hazard Information System of the National Oceanic and Atmospheric Administration), NOAA Public Reference Facility, 1305 East-West Highway (SSMC4), Room 8627, Silver Spring, MD 20910

3. Former components of the Department of Defense:

The National Communication Service (A former component of the Defense Information Systems Agency) does not maintain a conventional public reading room. Records that are required to be in the public reading room are available electronically at *http://disa.mil/gc/foia/foia.html*

4. Former components and programs of the Department of Energy:

The address for each component and program listed below is: U.S. Department of Energy; 1000 Independence Avenue, SW., Washington, DC 20585

Energy Assurance Office

Environmental Measurements Laboratory

Nuclear Incident Response Team

The chemical and biological national security and supporting programs and activities of the non-proliferation and verification research and development program.

The life sciences activities related to microbial pathogens of Biological and Environmental Research Program.

The nuclear smuggling programs and activities within the proliferation detection program of the non-proliferation and verification research and development program.

The nuclear assessment program and activities of the assessment, detection, and cooperation program of the international materials protection and cooperation program, and the advanced scientific computing research program and activities at Lawrence Livermore National Laboratory.

The National Infrastructure Simulation and Analysis Center

5. Former components of the Department of Health and Human Services:

For the Metropolitan Medical Response System, the National Disaster Medical System, and the Office of Emergency Preparedness please contact the Freedom of Information Act Officer at: Department of Health and Human Services, Freedom of Information Officer, Room 645–F, Hubert H. Humphrey Building, Independence Avenue, SW., Washington, DC 20201

Strategic National Stockpile, Centers for Disease Control and Agency for Toxic Substances and Disease Registry, 1600 Clifton Road, NE., Room 4103, Building 1, Atlanta, GA 30333

6. Former components of the Department of Justice:

Immigration and Naturalization Service, 111 Massachusetts Avenue, NW., 2nd Floor, ULLICO Building, Washington, DC 20536

For the National Infrastructure Protection Center, the National Domestic Preparedness Office, and the Domestic Emergency Support Team: Federal Bureau of Investigation, 935 Pennsylvania Avenue, NW., Department of Justice, Washington, DC 20535–0001

Office of Domestic Preparedness, U.S. Department of Justice, Office of Justice Programs, 810 7th Street, NW., Room 5430, Washington, DC 20531

7. Former components of the Department of State:

Visa Office, Department of State, 2201 C Street, NW., Washington, DC 20520

8. Former components of the Department of Transportation:

Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591

Transportation Security Administration, 400 Seventh Street, SW., Washington, DC 20590

United States Coast Guard Headquarters, 2100 Second Street, SW., Washington, DC

20593–0001 (for district offices, consult your phone book).

9. Former components of the Department of Treasury:

The Federal Law Enforcement Training Center does not maintain a conventional public reading room. Records that are required to be in the public reading room are available electronically at *http://www.fletc.gov/irm/foia/readingroom.htm*

U.S. Customs Service, 1300 Pennsylvania Avenue, NW., Washington, DC 20229 (for a list of field office public reading rooms please consult 19 CFR 103.1).

U.S. Secret Service, Main Treasury, 1500 Pennsylvania Avenue, NW., Washington, DC 20220

10. Federal Emergency Management Agency:

Federal Emergency Management Agency, Federal Center Plaza, 500 C Street, SW., Room 840 Washington, DC 20472 (for regional offices, consult your phone book)

11. Former components of the General Services Administration:

For the Federal Computer Incident Response Center and the Federal Protective Service: Central Office, GSA Headquarters, 1800 F Street, NW., (CAI), Washington, DC 20405 (for regional offices, consult your phone book).

PART 7—CLASSIFIED NATIONAL SECURITY INFORMATION

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AUTHORITY: 5 U.S.C. 301; Pub. L. 107–296, 116 Stat. 2135 (6 U.S.C. 101); E.O. 12958, 60 FR 19825, 3 CFR, 1995 Comp., p. 333; E.O. 13142, 64 FR 66089, 3 CFR, 1999 Comp., p. 236; 32 CFR part 2001.

SOURCE: 70 FR 61213, Oct. 21, 2005, unless otherwise noted.

§ 7.1 Purpose.

The purpose of this part is to ensure that information within the Department of Homeland Security (DHS) relating to the national security is classified, safeguarded, and declassified pursuant to the provisions of Executive Order 12958, as amended, and implementing directives from the Information Security Oversight Office (ISOO) of the National Archives and Records Administration (NARA).

§ 7.2 Scope.

(a) This part applies to all employees, detailees and non-contractor personnel outside the Executive Branch who are granted access to classified information by the DHS, in accordance with the standards in Executive Order 12958, as amended, and its implementing directives.

(b) This part does not apply to contractors, grantees and other categories of personnel falling under the purview of Executive Order 12829, National Industrial Security Program, and its implementing directives.

(c) This part is independent of and does not affect any classification procedures or requirements of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2011 *et seq*).

(d) This part does not, and is not intended to, create any right to judicial review, or any other right or benefit or trust responsibility, substantive or procedural, enforceable by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person. This part creates limited rights to administrative review of decisions. This part does not, and is not intended to, create any right to judicial review of administrative action.

§ 7.3 Definitions.

The terms defined or used in Executive Order 12958, as amended, and the implementing directives in 32 CFR parts 2001 and 2004, are applicable to this part.

Subpart A—Administration

§ 7.10 Authority of the Chief Security Officer, Office of Security.

(a) The DHS Chief Security Officer (hereafter ''Chief Security Officer'') is designated as the Senior Agency Official as required by section 5.4(d) of Executive Order 12958, as amended, and, except as specifically provided elsewhere in this part, is authorized to administer the DHS Classified National Security Information program pursuant to Executive Order 12958, as amended.

(b) The Chief Security Officer shall, among other actions:

(1) Oversee and administer the DHS's program established under Executive Order 12958, as amended;

(2) Promulgate implementing regulations;

(3) Establish and maintain Department-wide security education and training programs;

(4) Establish and maintain an ongoing self-inspection program including the periodic review and assessment of the DHS's classified product;

(5) Establish procedures to prevent unnecessary access to classified information, including procedures that:

(i) Require that a need for access to classified information is established before initiating administrative procedures to grant access; and

(ii) Ensure that the number of persons granted access to classified information is limited to the minimum necessary for operational and security requirements and needs;

(6) Develop special contingency plans for the safeguarding of classified information used in or near hostile or potentially hostile areas;

(7) Coordinate with the DHS Chief Human Capital Officer, as appropriate to ensure that the performance contract or other system used to rate personnel performance includes the management of classified information as a critical element or item to be evaluated in the rating of:

(i) Original classification authorities;

(ii) Security managers or security specialists; and

(iii) All other personnel whose duties significantly involve the creation or handling of classified information;

(8) Account for the costs associated with implementing this part and report the cost to the Director of ISOO;

(9) Assign in a prompt manner personnel to respond to any request, appeal, challenge, complaint, or suggestion concerning Executive Order 12958, as amended, that pertains to classified information that originated in a DHS component that no longer exists and for which there is no clear successor in function;

(10) Report violations, take corrective measures and assess appropriate sanctions as warranted, in accordance with Executive Order 12958, as amended;

(11) Overseeing DHS participation in special access programs authorized under Executive Order 12958, as amended;

(12) Direct and administer DHS's personnel security program in accordance with Executive Order 12968 and other applicable law;

(13) Direct and administer DHS implementation and compliance with the National Industrial Security Program in accordance with Executive Order 12829 and other applicable guidance; and

(14) Perform any other duties as the Secretary may designate.

(c) The Chief Security Officer shall maintain a current list of all officials authorized pursuant to this part to originally classify or declassify documents.

§ 7.11 Components' responsibilities.

Each DHS component shall appoint a security officer or security liaison to implement this part. the security officer/security liaison shall:

(a) Implement, observe, and enforce security regulations or procedures within their component with respect to the classification, declassification, safeguarding, handling, and storage of classified national security information;

(b) Report violations of the provisions of this regulation to the Chief Security Officer committed by employees of their component, as required;

(c) Ensure that employees of their component acquire adequate security education and training, as required by the DHS classified information security procedures;

(d) Continuously review the requirements for personnel access to classified information as a part of the continuous need-to-know evaluation, and initiate action to administratively withdraw or reduce the level of access authorized, as appropriate; and

(e) Cooperate fully with any request from the Chief Security Officer for assistance in the implementation of this part.

§ 7.12 Violations of classified information requirements.

(a) Any person who suspects or has knowledge of a violation of this part, including the known or suspected loss or compromise of classified information, shall promptly report such violations or possible violations, pursuant to requirements set forth in DHS directives.

(b) DHS employees and detailees may be reprimanded, suspended without pay, terminated from classification authority, suspended from or denied access to classified information, or subject to other sanctions in accordance with applicable law and DHS regulations or directives if they:

(1) Knowingly, willfully, or negligently disclose to unauthorized persons information properly classified under Executive Order 12958, as amended, or its predecessor orders;

(2) Knowingly, willfully, or negligently classify or continue the classification of information in violation of Executive Order 12958, as amended, or its implementing directives; or

(3) Knowingly, willfully, or negligently violate any other provision of Executive Order 12958, as amended, or DHS implementing directives, or;

(4) Knowingly, willfully, or negligently grant eligibility for, or allow access to, classified information in violation of Executive Order 12958, or its implementing directives, this part, or DHS implementing directives promulgated by the Chief Security Officer.

§ 7.13 Judicial proceedings.

(a) Any DHS official or organization receiving an order or subpoena from a Federal or State court, or an administrative subpoena from a Federal agency, to produce classified information (see 6 CFR 5.41 through 5.49), required to submit classified information for official DHS litigative purposes, or receiving classified information from another organization for production of such in litigation, shall notify the Office of the General Counsel, unless the demand for production is made by the Office of the General Counsel, and immediately determine from the agency originating the classified information whether the information can be declassified. If declassification is not possible, DHS representatives will take appropriate action to protect such information, pursuant to the provisions of this section.

(b) If a determination is made to produce classified information in a judicial proceeding in any manner, the DHS General Counsel attorney, in conjunction with the Department of Justice, shall take appropriate steps to protect classified information in judicial proceedings and retrieve the information when the information is no longer required in such judicial proceedings, in accordance with the Department of Justice procedures, and in Federal criminal cases, pursuant to the requirements of Classified Information Procedures Act (CIPA), Public Law 96–456, 94 Stat. 2025, (18 U.S.C. App.), and the ''Security Procedures Established Pursuant to Public Law 96–456, 94 Stat. 2025, by the Chief Justice of the United States for the Protection of Classified Information,'' and other applicable authorities.

Subpart B—Classified Information

§ 7.20 Classification and declassification authority.

(a) Top Secret original classification authority may only be exercised by the Secretary of Homeland Security and by officials to whom such authority is delegated in writing by the Secretary. The Chief Security Officer, as the Senior

Agency Official, is delegated authority to originally classify information up to and including Top Secret. No official who is delegated Top Secret original classification authority by the Secretary may further delegate such authority.

(b) The Chief Security Officer may delegate Secret and Confidential original classification authority to other officials determined to have frequent need to exercise such authority. No official who is delegated original classification authority by the Secretary or the Chief Security Officer may further delegate such authority.

(c) Officials authorized to classify information at a specified level are also authorized to classify information at a lower level. In the absence of an official authorized to exercise classification authority, the person designated to act in lieu of such official may exercise the official's classification authority.

§ 7.21 Classification of information, limitations.

(a) Information may be originally classified only if all of the following standards are met:

(1) An original classification authority is classifying the information;

(2) The information is owned by, produced by or for, or is under the control of the United States Government;

(3) The information falls within one or more of the categories of information specified in section 1.4 of Executive Order 12958, as amended; and

(4) The original classification authority determines that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security and such official is able to identify or describe the damage.

(b) Information shall be classified as Top Secret, Secret, or Confidential in accordance with and in compliance with the standards and criteria in Executive Order 12958, as amended. No other terms shall be used to identify United States classified information except as otherwise provided by statute.

(c) Information shall not be classified in order to:

(1) Conceal inefficiency, violations of law, or administrative error;

(2) Prevent embarrassment to a person, organization, or agency;

(3) Restrain competition;

(4) Prevent or delay release of information that does not require protection in the interest of national security.

(d) Information may be reclassified after it has been declassified and released to the public under proper authority only in accordance with the following conditions:

(1) The reclassification action is taken under the personal authority and with the written approval of the Secretary or Deputy Secretary of Homeland Security, based on the determination that the reclassification of the information is necessary in the interest of the national security;

(2) The reclassification of the information meets the standards and criteria for classification pursuant to Executive Order 12958, as amended;

(3) The information may be reasonably recovered; and

(4) The reclassification action is reported promptly to the Director of ISOO.

(e) Information that has not previously been disclosed to the public under proper authority may be classified or reclassified after DHS has received a request for it under the Freedom of Information Act (5 U.S.C. 552), the Privacy Act of 1974 (5 U.S.C. 552a), or the mandatory review provisions of Executive Order 12958, as amended, section 3.5. When it is necessary to classify or reclassify such information, it shall be forwarded to the Chief Security Officer and classified or reclassified only at the direction of the Secretary or Deputy Secretary of Homeland Security.

§ 7.22 Classification pending review.

(a) Whenever persons who do not have original classification authority originate or develop information that they believe requires immediate classification and safeguarding, and no authorized classifier is available, that person shall:

(1) Safeguard the information in a manner appropriate for the classification level they believe it to be;

(2) Apply the appropriate overall classification markings; and

(3) Within five working days, securely transmit the information to the organization that has appropriate subject matter interest and classification authority.

(b) When it is not clear which component would be the appropriate original classifier, the information shall be sent to the Chief Security Officer to determine the appropriate organization.

(c) The organization with classification authority shall decide within 30 days whether to classify the information.

§ 7.23 Emergency release of classified information.

(a) The Secretary of Homeland Security has delegated to certain DHS employees the authority to disclose classified information to an individual or individuals not otherwise routinely eligible for access in emergency situations when there is an imminent threat to life or in defense of the homeland.

(b) In exercising this authority, the delegees shall adhere to the following conditions:

(1) Limit the amount of classified information disclosed to a minimum to achieve the intended purpose;

(2) Limit the number of individuals who receive it to only those persons with a specific need-to-know;

(3) Transmit the classified information through approved communication channels by the most secure and expeditious method possible, or by other means deemed necessary in exigent circumstances;

(4) Provide instructions about what specific information is classified and how it should be safeguarded. Physical custody of classified information must remain with an authorized Federal Government entity, in all but the most extraordinary circumstances as determined by the delegated official;

(5) Provide appropriate briefings to the recipients on their responsibilities not to disclose the information and obtain from the recipients a signed DHS Emergency Release of Classified Information Non-disclosure Form. In emergency situations requiring immediate verbal release of information, the signed nondisclosure agreement memorializing the briefing may be received after the emergency abates;

(6) Within 72 hours of the disclosure of classified information, or the earliest opportunity that the emergency permits, but no later than 7 days after the release, the disclosing authority must notify the DHS Chief Security Officer and the originating agency of the information disclosed. A copy of the signed nondisclosure agreements should be forwarded with the notification under this paragraph (b)(6), or as soon thereafter as practical.

(7) Release of information pursuant to this authority does not constitute declassification of the information.

(8) Authority to disclose classified information may not be further delegated.

§ 7.24 Duration of classification.

(a) At the time of original classification, original classification authorities shall apply a date or event in which the information will be automatically declassified.

(b) The original classification authority shall attempt to establish a specific date or event not more than 10 years after the date of origination in which the information will be automatically declassified. If the original classification authority cannot determine an earlier specific date or event it shall be marked for automatic declassification 10 years from the date of origination.

(c) If the original classification authority determines that the sensitivity of the information requires classification beyond 10 years, it may be marked for automatic declassification for up to 25 years from the date of original classification decision.

(d) Original classification authorities do not have the authority to classify or retain the classification of information beyond 25 years from the date of origination. The only exception to this rule is when disclosure of the information could be expected to reveal the identity of a confidential human source or human intelligence source. In this instance, the information may be marked for declassification as ''25X1–Human,'' indicating that the information is exempt from the ''25 Year Rule'' for automatic declassification. This marking is

not authorized for use when the information pertains to non-human intelligence sources or intelligence methods. In all other instances, classification beyond 25 years shall only be authorized in accordance with § 7.28 of this part and Executive Order 12958, as amended.

§ 7.25 Identification and markings.

(a) Classified information must be marked pursuant to the standards set forth in section 1.6 of Executive Order 12958, as amended; 32 CFR part 2001, subpart B; and internal DHS guidance provided by the Chief Security Officer.

(b) Foreign government information shall retain its original classification markings or be assigned a U.S. classification that provides a degree of protection at least equivalent to that required by the entity that furnished the information.

(c) Information assigned a level of classification under predecessor Executive Orders shall remain classified at that level of classification, except as otherwise provided herein, *i.e.*, the information is reclassified or declassified.

§ 7.26 Derivative classification.

(a) Derivative classification is defined as the incorporating, paraphrasing, restating, or generating in a new form information that is already classified, and marking the newly developed material consistent with the classification markings that apply to the source information. Information is also derivatively classified when classification is based on instructions provided in a security classification guide.

(b) Persons need not possess original classification authority to derivatively classify information based on source documents or classification guides.

(c) Persons who apply derivative classification markings shall observe original classification decisions and carry forward to any newly created documents the pertinent classification markings.

(d) Information classified derivatively from other classified information shall be classified and marked in accordance with the standards set forth in sections 2.1 and 2.2 of Executive Order 12958, as amended, 32 CFR 2001.22, and internal DHS guidance provided by the Chief Security Officer.

§ 7.27 Declassification and downgrading.

(a) Classified information shall be declassified as soon as it no longer meets the standards for classification. Declassification and downgrading is governed by Part 3 of Executive Order 12958, as amended, implementing ISOO directives at 32 CFR part 2001, subpart C, and applicable internal DHS direction provided by the Chief Security Officer.

(b) Information shall be declassified or downgraded by the official who authorized the original classification if that official is still serving in the same position, the originator's successor, or a supervisory official of either, or by officials delegated such authority in writing by the Secretary of Homeland Security or the Chief Security Officer.

(c) It is presumed that information that continues to meet the classification requirements under Executive Order 12958, as amended, requires continued protection. In some exceptional cases during declassification reviews, the need to protect classified information may be outweighed by the public interest in disclosure of the information, and in these cases the information should be declassified. If it appears that the public interest in disclosure of the information may outweigh the need to protect the information, the declassification reviewing official shall refer the information with a recommendation for decision to the Chief Security Officer. The Chief Security Officer shall review the information and make a recommendation to the Secretary on whether the public interest in disclosure outweighs the damage to national security that might reasonably be expected from disclosure. The Secretary shall decide whether to declassify the information. The decision of the Secretary shall be final. This provision does not amplify or modify the substantive criteria or procedures for classification or create any substantive or procedural rights subject to judicial review.

(d) Each component shall develop schedules for declassification of records in the National Archives.

§ 7.28 Automatic declassification.

(a) Subject to paragraph (b) of this section, all classified information contained in records that are more than 25 years old that have been determined to have permanent historical value shall be declassified automatically on December 31, 2006. Subsequently, all classified information in such records shall be automatically declassified not later than 25 years after the date of its original classification with the exception of specific information exempt from automatic declassification pursuant to section 3.3 (b) through (d) of Executive Order 12958, as amended.

(b) At least 180 days before information is declassified automatically under this section, the Chief Security Officer shall notify the ISOO of any specific information that DHS proposes to exempt from automatic declassification. The notification shall include:

(1) A description of the information;

(2) An explanation of why the information is exempt from automatic declassification and must remain classified for a longer period of time; and

(3) A specific date or event for declassification of the information whenever the information exempted does not identify a confidential human source or human intelligence source.

(c) Proposed exemptions under this section shall be forwarded to the Chief Security Officer. When the Chief Security Officer determines the exemption request is consistent with this section, he or she will submit the exemption request to the Executive Secretary of the Interagency Security Classification Appeals Panel (ISCAP) for approval.

(d) Declassification guides that narrowly and precisely define exempted information may be used to exempt information from automatic declassification. Declassification guides must include the exemption notification information detailed in paragraph (b) of this section, and be approved pursuant to paragraph (c) of this section.

§ 7.29 Documents of permanent historical value.

The original classification authority, to the greatest extent possible, shall declassify classified information contained in records determined to have permanent historical value under 44 U.S.C. 2107 before they are accessioned into the National Archives.

§ 7.30 Classification challenges.

(a) Authorized holders of information classified by DHS who, in good faith, believe that specific information is improperly or unnecessarily classified are encouraged and expected to challenge the classification status of that information pursuant to section 1.8 of Executive Order 12958, as amended. Authorized holders may submit classification challenges in writing to the original classification authority with jurisdiction over the information in question. If an original classification authority cannot be determined, the challenge shall be submitted to the Chief Security Officer. The challenge need not be more specific than a question as to why the information is or is not classified, or is classified at a certain level.

(b) If anonymity of the challenger is requested, the challenger may submit the challenge to the Office of Security. The Office of Security will act as an agent for the challenger and the identity of the challenger will be redacted.

(c) The original classification authority shall promptly, and in no case later than 60 days, provide a written response to the submitter. The original classification authority may classify or declassify the information subject to the challenge and, if applicable, state specific reasons why the original classification determination was proper. If the original classification authority is not able to respond within 60 days, he or she shall inform the individual who filed the challenge in writing of that fact, and the anticipated determination date.

(d) The individual challenging the classification will be notified of the determination made by the original classification authority and that the individual may appeal this determination to the Chief Security Officer. Upon receipt of such appeals, the Chief Security Officer shall convene a DHS Classification Appeals Panel (DHS/CAP). The DHS/CAP shall, at a minimum, consist of representatives from the Office of Security, the Office of General Counsel, and a representative from the component having jurisdiction over the information. Additional members may

be added as determined by the DHS Chief Security Officer. The DHS/CAP shall be chaired by the Chief Security Officer.

(e) If the requester files an appeal through the DHS/CAP, and the appeal is denied, the requester shall be notified of the right to appeal the denial to the Interagency Security Classification Appeals Panel (ISCAP) pursuant to section 5.3 of Executive Order 12958, as amended, and the rules issued by the ISCAP pursuant to section 5.3 of Executive Order 12958, as amended.

(f) Any individual who challenges a classification and believes that any action has been taken against him or her in retaliation or retribution because of that challenge shall report the facts to the Office of the Inspector General or other appropriate office.

(g) Nothing in this section shall prohibit a person from informally challenging the classified status of information directly to the original classification authority.

(h) Requests for review of classified material for declassification by persons other than authorized holders are governed by 6 CFR 7.31.

§ 7.31 Mandatory review for declassification requests.

(a) Any person may request that classified information be reviewed for declassification pursuant to the mandatory declassification review provisions of section 3.6 of Executive Order 12958, as amended. Such requests shall be sent to the Departmental Disclosure Officer, Privacy Office, 245 Murray Lane, SW., Building 410, Washington, DC 20528.

(b) The request must sufficiently describe the document or material with enough specificity to allow it to be located by the component with a reasonable amount of effort. When the description of the information in the request is deficient, the component shall solicit as much additional identifying information as possible from the requester. If the information or material requested cannot be obtained with a reasonable amount of effort, the component shall provide the requester, through the DHS Disclosure Officer, with written notification of the reasons why no action will be taken and of the requester's right to appeal.

(c) Requests for review of information that has been subjected to a declassification review request within the preceding two years shall not be processed. The DHS Disclosure Officer will notify the requester of such denial.

(d) Requests for information exempted from search or review under sections 701, 702, or 703 of the National Security Act of 1947, as added and amended (50 U.S.C. 431 through 433), or other provisions of law, shall not be processed. The DHS Disclosure Officer will notify the requester of such denial.

(e) If documents or material being reviewed for declassification under this section contain information that has been originally classified by another government agency, the reviewing authority shall notify the DHS Disclosure Officer. Unless the association of that organization with the requested information is itself classified, the DHS Disclosure Officer will then notify the requester of the referral.

(f) A DHS component may refuse to confirm or deny the existence, or non-existence, of requested information when its existence or non-existence, is properly classified.

(g) DHS components shall make a final determination on the request as soon as practicable but within one year from receipt. When information cannot be declassified in its entirety, components shall make reasonable efforts to redact those portions that still meet the standards for classification and release those declassified portions of the requested information that constitute a coherent segment.

(h) DHS components shall notify the DHS Disclosure Officer of the determination made in the processing of a mandatory review request. Such notification shall include the number of pages declassified in full; the number of pages declassified in part; and the number of pages where declassification was denied.

(i) The DHS Disclosure Officer shall maintain a record of all mandatory review actions for reporting in accordance with applicable Federal requirements.

(j) The mandatory declassification review system shall provide for administrative appeal in cases where the review results in the information remaining classified. The requester shall be notified of the results of the review and of the right to appeal the denial of declassification. To address such appeals, the DHS Disclosure Office shall convene a DHS Classification Appeals Panel (DHS/CAP). The DHS/CAP shall, at a minimum, consist of representatives from the Disclosure Office, the Office of Security, the Office of General Counsel, and a representative from the component having jurisdiction over the information. Additional members may be added as determined by the DHS Disclosure Officer. The DHS/CAP shall be chaired by the DHS Disclosure Officer.

(k) If the requester files an appeal through the DHS/CAP, and the appeal is denied, the requester shall be notified of the right to appeal the denial to the ISCAP pursuant to section 5.3 of Executive Order 12958, as amended, and the rules issued by the ISCAP pursuant to section 5.3 of Executive Order 12958, as amended.

PART 9—RESTRICTIONS UPON LOBBYING

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APPENDIX A TO PART 9—CERTIFICATION REGARDING LOBBYING
APPENDIX B TO PART 9—DISCLOSURE FORM TO REPORT LOBBYING

AUTHORITY: Sec. 319, Pub. L. 101–121, 103 Stat. 750 (31 U.S.C. 1352); Pub. L. 107–296, 116 Stat. 2135 (6 U.S.C. 1 *et seq.*); 5 U.S.C. 301.

SOURCE: 68 FR 10912, Mar. 6, 2003, unless otherwise noted.

Subpart A—General

§9.1 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 to this part, 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 to this part, if such person has made or has agreed to make any payment using non appropriated funds (to include profits from any covered Federal action), which would be prohibited under paragraph (a) of this section if paid for with appropriated funds.

(d) Each person who requests or receives from an agency a commitment

providing for the United States to insure or guarantee a loan shall file with that agency a statement, set forth in Appendix A to this part, 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 to this part, 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.

§ 9.2 Definitions.

For purposes of this part:

(a) *Agency* has the same meaning as provided in 5 U.S.C. 552(f), and 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) The term *covered Federal action*:

(1) Means any of the following Federal actions:

(i) The awarding of any Federal contract;

(ii) The making of any Federal grant;

(iii) The making of any Federal loan;

(iv) The entering into of any cooperative agreement; and

(v) The extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

(2) 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) (48 CFR Chapter 1) 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 that 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 definition of Indian tribe 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* or 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 appointed to a position in the Government pursuant to title 5 of the United States Code, including any position by temporary appointment or any appointment as an

acting official as outlined in section 1511(c) of the Homeland Security Act;

(2) A member of the uniformed services as defined in 37 U.S.C. 101(3);

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

(4) An individual who is a member of a Federal advisory committee, as defined by the Federal Advisory Committee Act at 5 U.S.C. App. 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 sub grantees at any tier of the recipient of funds received in connection with a Federal contract, grant, loan, or cooperative agreement. The term excludes an Indian tribe, tribal organization, or any other Indian organization with respect to expenditures specifically permitted by other Federal law.

(p) *Regularly employed* means, with respect to an officer or employee of a person requesting or receiving a Federal contract, grant, loan, or cooperative agreement or a commitment providing for the United States to insure or guarantee a loan, an officer or employee who is employed by such person for at least 130 working days within one year immediately preceding the date of the submission that initiates agency consideration of such person for receipt of such contract, grant, loan, cooperative agreement, loan insurance commitment, or loan guarantee commitment. An officer or employee who is employed by such person for less than 130 working days within one year immediately preceding the date of the submission that initiates agency consideration of such person shall be considered to be regularly employed as soon as he or she is employed by such person for 130 working days.

(q) *State* means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, a territory or possession of the United States, an agency or instrumentality of a State, and a multi-State, regional, or interstate entity having governmental duties and powers.

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

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

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

(2) A filing described in paragraph (b)(1) of this section shall not be required if such person previously filed a certification, and a disclosure form 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;

(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)(1) The requirements of paragraph (d)(2) of this section apply to any person who requests or receives from a person referred to in paragraph (a) or (b) of this section:

(i) A subcontract exceeding $100,000 at any tier under a Federal contract;

(ii) A subgrant, contract, or subcontract exceeding $100,000 at any tier under a Federal grant;

(iii) A contract or subcontract exceeding $100,000 at any tier under a Federal loan exceeding $150,000; or

(iv) A contract or subcontract exceeding $100,000 at any tier under a Federal cooperative agreement.

(2) A person described in paragraph (d)(1) of this section shall file a certification, and a disclosure form, if required, to the next tier.

(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 31 U.S.C. 1352.

(g) No reporting is required for an activity paid for with appropriated funds if that activity is allowable under either subpart B or C of this part.

Subpart B—Activities by Own Employees

§ 9.11 Agency and legislative liaison.

(a) The prohibition on the use of appropriated funds, in § 9.1(a), does not apply in the case of a payment of reasonable compensation made to an officer or employee of a person requesting or receiving a Federal contract, grant, loan, or cooperative agreement if the payment is for agency and legislative liaison activities not directly related to a covered Federal action.

(b) For purposes of paragraph (a) of this section, providing any information specifically requested by an agency or Congress is allowable at any time.

(c) For purposes of paragraph (a) of this section, the following agency and legislative liaison activities are allowable at any time only where they are not related to a specific solicitation for any covered Federal action:

(1) Discussing with an agency (including individual demonstrations) the qualities and characteristics of the person's products or services, conditions or terms of sale, and service capabilities; and

(2) Technical discussions and other activities regarding the application or adaptation of the person's products or services for an agency's use.

(d) For purposes of paragraph (a) of this section, the following agencies and legislative liaison activities are allowable only where they are prior to formal solicitation of any covered Federal action:

(1) Providing any information not specifically requested but necessary for an agency to make an informed decision about initiation of a covered Federal action;

(2) Technical discussions regarding the preparation of an unsolicited proposal prior to its official submission; and

(3) Capability presentations by persons seeking awards from an agency pursuant to the provisions of the Small Business Act, as amended.

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

§9.15 Professional and technical services.

(a) The prohibition on the use of appropriated funds, in §9.1(a), does not apply in the case of a payment of reasonable compensation made to an officer or employee of a person requesting or receiving a Federal contract, grant, loan, or cooperative agreement or an extension, continuation, renewal, amendment, or modification of a Federal contract, grant, loan, or cooperative agreement if payment is for professional or technical services rendered directly in the preparation, submission, or negotiation of any bid, proposal, or application for that Federal contract, grant, loan, or cooperative agreement or for meeting requirements imposed by or pursuant to law as a condition for receiving that Federal contract, grant, loan, or cooperative agreement.

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

(c) Requirements imposed by or pursuant to law as a condition for receiving a covered Federal award include those required by law or regulation, or reasonably expected to be required by law or regulation, and any other requirements in the actual award documents.

(d) Only those services expressly authorized by this section are allowable under this section.

§9.20 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

§9.23 Professional and technical services.

(a) The prohibition on the use of appropriated funds, in §9.1(a), does not apply in the case of any reasonable payment to a person, other than an officer or employee of a person requesting or receiving a covered Federal action, if the payment is for professional or technical services rendered directly in the preparation, submission, or negotiation of any bid, proposal, or application for that Federal contract, grant, loan, or cooperative agreement or for meeting requirements imposed by or pursuant to law as a condition for receiving that Federal contract, grant, loan, or cooperative agreement.

(b) The reporting requirements in §9.3(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 of a legal document accompanying a bid or proposal by a lawyer is allowable. Similarly, technical advice provided by an engineer on the performance or operational capability of a piece of equipment rendered directly in the negotiation of a contract is allowable. However, communications with the intent to influence made by a professional (such as a licensed lawyer) or a technical person (such as a licensed accountant) are not allowable under this section unless they provide advice and analysis directly applying their professional or technical expertise and unless the advice or analysis is rendered directly and solely in the preparation, submission or negotiation of a covered Federal action. Thus, for example, communications with the intent to influence made by a lawyer that do not provide legal advice or analysis directly and solely related to the legal aspects of his or her client's proposal, but generally advocate one proposal over another are not allowable under this section because the lawyer is not providing professional legal services. Similarly, communications with the intent to influence made by an engineer providing an engineering analysis prior to the preparation or submission of a bid or proposal are not allowable under this section since the engineer is providing technical services but not directly in the preparation, submission or negotiation of a covered Federal action.

(d) Requirements imposed by or pursuant to law as a condition for receiving a covered Federal action 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

§ 9.31 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 this part) to be filed or amended if required herein, shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such failure.

(c) A filing or amended filing on or after the date on which an administrative action for the imposition of a civil penalty is commenced does not prevent the imposition of such civil penalty for a failure occurring before that date. An administrative action is commenced with respect to a failure when an investigating official determines in writing to commence an investigation of an allegation of such failure.

(d) In determining whether to impose a civil penalty, and the amount of any such penalty, by reason of a violation by any person, the agency shall consider the nature, circumstances, extent, and gravity of the violation, the effect on the ability of such person to continue in business, any prior violations by such person, the degree of culpability of such person, the ability of the person to pay the penalty, and such other matters as may be appropriate.

(e) First offenders under paragraphs (a) or (b) of this section shall be subject to a civil penalty of $10,000, absent aggravating circumstances. Second and subsequent offenses by persons shall be subject to an appropriate civil penalty between $10,000 and $100,000, as determined by the agency head or his or her designee.

(f) An imposition of a civil penalty under this section does not prevent the United States from seeking any other remedy that may apply to the same conduct that is the basis for the imposition of such civil penalty.

§ 9.32 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. 3803 (except subsection (c)), 3804, 3805, 3806, 3807, 3808, and 3812, insofar as these provisions are not inconsistent with the requirements in this part.

§9.33 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

§9.41 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

§9.51 Semi-annual compilation.

(a) The head of each agency shall collect and compile the disclosure reports (see Appendix B to this part) 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) Agencies shall keep the originals of all disclosure reports in the official files of the agency.

§9.52 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 an evaluation of the compliance of that agency with, and the effectiveness of, the requirements in this part. 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 9—CERTIFICATION REGARDING LOBBYING

Certification for Contracts, Grants, Loans, and Cooperative Agreements

I. The undersigned certifies, to the best of his or her knowledge and belief, that:

(1) No Federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of an agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

(2) If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this Federal contract, grant, loan, or cooperative agreement, the undersigned shall complete and submit Standard Form—LLL, ''Disclosure Form to Report Lobbying,'' in accordance with its instructions.

(3) The undersigned shall require that the language of this certification be included in the award documents for all sub awards 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 31 U.S.C. 1352. 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.

II. 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 31 U.S.C. 1352. 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.

APPENDIX B TO PART 9—DISCLOSURE FORM TO REPORT LOBBYING

DISCLOSURE OF LOBBYING ACTIVITIES

Approved by OMB 0348-0046

Complete this form to disclose lobbying activities pursuant to 31 U.S.C. 1352
(See reverse for public burden disclosure.)

1. Type of Federal Action: a. contract b. grant c. cooperative agreement d. loan e. loan guarantee f. loan insurance	2. Status of Federal Action: a. bid/offer/application b. Initial award c. post-award	3. Report Type: a. initial filing b. material change For Material Change Only: year _____ quarter _____ date of last report_____
4. Name and Address of Reporting Entity: ☐ Prime ☐ Subawardee Tier_____, if known: Congressional District, if known:	5. If Reporting Entity in No. 4 is Subawardee, Enter Name and Address of Prime Congressional District, if known:	
6. Federal Department/Agency:	7. Federal Program Name/Description CFDA Number, if applicable: _____	
8. Federal Action Number, if known:	9. Award Amount, if known: $	
10. a. Name and Address of Lobbying Entity (if individual, last name, first name, MI): (attach Continuation Sheet(s) SF-LLL-A, if necessary)	b. Individual Performing Services (including address if different from No. 10a) (last name, first name, MI)	
11. Amount of Payment (check all that apply): $_____ ☐ actual ☐ planned 12. Form of Payment (check all that apply): ☐ a. cash ☐ b. in-kind; specify: nature_____ value_____	13. Type of Payment (check all that apply): ☐ a. retainer ☐ b. one-time fee ☐ c. commission ☐ d. contingent fee ☐ e. deferred ☐ f. other; specify: _____	
14. Brief Description of Services Performed or to be Performed and Date(s) of Service, including officer(s), employee(s), or Member(s) contacted, for payment indicated in Item 11: (attach Continuation Sheet(s) SF-LLL-A, if necessary)		
15. Continuation Sheet(s) SF-LLL-A attached: Yes No		
16. Information requested through this form is authorized by title 31 U.S.C. section 1352. This disclosure of lobbying activities is a material representation of fact upon which reliance was placed by the tier above when this transaction was made or entered into. This disclosure is required pursuant to 31 U.S.C. 1352. This information will be reported to the Congress semi-annually and will be available for public inspection. Any person who fails to file the required disclosure shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each failure.	Signature:_____ Print Name:_____ Title:_____ Telephone No.:_____ Date:_____	
Federal Use Only	Authorized for Local Reproduction Standard Form--LLL	

DISCLOSURE OF LOBBYING ACTIVITIES
CONTINUATION SHEET

Approved by OMB
0348-0046

Reporting Entity:_____ Page _____ of _____

Authorized for Local Reproduction
Standard Form--LLL-A

INSTRUCTIONS FOR COMPLETION OF SF-LLL, DISCLOSURE OF LOBBYING ACTIVITIES

This disclosure form shall be completed by the reporting entity, whether subawardee of 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 of 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 follow-up 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 charge 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.

PART 13—PROGRAM FRAUD CIVIL REMEDIES

Sec.

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§ 13.1 Basis, purpose, scope and effect.

(a) *Basis*. This part implements the Program Fraud Civil Remedies Act of 1986, 31 U.S.C. 3801–3812. Section 3809 of title 31, United States Code, requires each authority to promulgate regulations necessary to implement the provisions of the statute.

(b) *Purpose*. This part:

(1) Establishes administrative procedures for imposing civil penalties and assessments against Persons who Make, submit, or present, or cause to be Made, submitted, or presented, false, fictitious, or fraudulent Claims or written Statements to the Authority or to certain others; and

(2) Specifies the hearing and appeal rights of Persons subject to allegations of liability for such penalties and assessments.

(c) *Scope*. This part applies to all components of the Department of Homeland Security.

(d) *Effect*. (1) This part applies to program fraud cases initiated by any component of the Department of Homeland Security on or after October 12, 2005.

(2) Program fraud cases initiated by any component of the Department of Homeland Security before October 12, 2005, but not completed before October 12, 2005, will continue to completion under the rules and procedures in effect before this part.

§ 13.2 Definitions.

The following definitions have general applicability throughout this part:

(a) *ALJ* means an Administrative Law Judge in the Authority appointed pursuant to 5 U.S.C. 3105 or detailed to the Authority pursuant to 5 U.S.C. 3344. An ALJ will preside at any hearing convened under the regulations in this part.

(b) *Authority* means the Department of Homeland Security.

(c) *Authority Head* means the Deputy Secretary, Department of Homeland Security, or another officer designated by the Deputy Secretary.

(d) *Benefit* means, in the context of a Statement, anything of value, including but not limited to any advantage, preference, privilege, license, permit, favorable decision, ruling, status, or loan guarantee.

(e) *Claim* means any request, demand, or submission:

(1) Made to the Authority for property, services, or money (including money representing grants, loans, insurance, or Benefits);

(2) Made to a recipient of property, services, or money from the Authority or to a party to a contract with the Authority:

(i) For property or services if the United States:

(A) Provided such property or services;

(B) Provided any portion of the funds for the purchase of such property or services; or

(C) Will reimburse such recipient or party for the purchase of such property or services; or

(ii) For the payment of money (including money representing grants, loans, insurance, or Benefits) if the United States:

(A) Provided any portion of the money requested or demanded; or

(B) Will reimburse such recipient or party for any portion of the money paid on such request or demand; or

(3) Made to the Authority which has the effect of decreasing an obligation to pay or account for property, services, or money.

(f) *Complaint* means the administrative Complaint served by the Reviewing Official on the Defendant under § 13.7.

(g) *Defendant* means any Person alleged in a Complaint under § 13.7 to be liable for a civil penalty or assessment under § 13.3.

(h) *Government* means the Government of the United States.

(i) *Individual* means a natural Person.

(j) *Initial Decision* means the written decision of the ALJ required by § 13.10 or § 13.37, and includes a revised Initial Decision issued following a remand or a motion for reconsideration.

(k) *Investigating Official* means the Inspector General of the Department of Homeland Security or an officer or employee of the Office of the Inspector General designated by the Inspector General and eligible under 31 U.S.C. 3801(a)(4)(B).

(l) *Knows or Has Reason to Know,* means that a Person, with respect to a Claim or Statement:

(1) Has actual knowledge that the Claim or Statement is false, fictitious, or fraudulent;

(2) Acts in deliberate ignorance of the truth or falsity of the Claim or Statement; or

(3) Acts in reckless disregard of the truth or falsity of the Claim or Statement.

(m) *Makes* includes presents, submits, and causes to be made, presented, or submitted. As the context requires, Making or Made will likewise include the corresponding forms of such terms.

(n) *Person* means any Individual, partnership, corporation, association, or private organization, and includes the plural of that term.

(o) *Representative* means an attorney who is a member in good standing of the bar of any State, Territory, or possession of the United States, the District of Columbia, or the Commonwealth of Puerto Rico. This definition is not intended to foreclose *pro se* appearances. That is, an Individual may appear for himself or herself, and a corporation or other entity may appear by an owner, officer, or employee of the corporation or entity.

(p) *Reviewing Official* means the General Counsel of the Department of Homeland Security, or other officer or employee of the Department who is designated by the General Counsel and eligible under 31 U.S.C. 3801(a)(8).

(q) *Statement* means any representation, certification, affirmation, Document, record, or accounting or bookkeeping entry Made:

(1) With respect to a Claim or to obtain the approval or payment of a Claim (including relating to eligibility to Make a Claim); or

(2) With respect to (including relating to eligibility for):

(i) A contract with, or bid or proposal for a contract with the Authority, or any State, political subdivision of a State, or other party, if the United States Government provides any portion of the money or property under such contract or for such grant, loan, or Benefit, or if the Government will reimburse such State, political subdivision, or party for any portion of the money or property under such contract or for such grant, loan, or Benefit; or

(ii) A grant, loan, or Benefit from, the Authority, or any State, political subdivision of a State, or other party, if the United States Government provides any portion of the money or property under such contract or for such grant, loan, or Benefit, or if the Government will reimburse such State, political subdivision, or party for any portion of the money or property under such contract or for such grant, loan, or Benefit.

§ 13.3 Basis for civil penalties and assessments.

(a) *Claims.* (1) Except as provided in paragraph (c) of this section, a Person will be subject, in addition to any other remedy that may be prescribed by law, to a civil penalty of not more than $5,500 for each Claim (as adjusted in accordance with the Federal Civil Penalties Inflation Adjustment Act of 1990 (Public Law 101–140), as amended by the Debt Collection Improvement Act of 1996 (Public Law 104–134)) if such Person Makes a Claim that such Person Knows or Has Reason to Know:

(i) Is false, fictitious, or fraudulent;

(ii) Includes or is supported by any written Statement that asserts a material fact that is false, fictitious, or fraudulent;

(iii) Includes or is supported by any written Statement that:

(A) Omits a material fact;

(B) Is false, fictitious, or fraudulent as a result of such omission; and

(C) Is a Statement in which the Person Making such Statement has a duty to include such material fact; or

(iv) Is for payment for the provision of property or services that the Person has not provided as claimed.

(2) Each voucher, invoice, Claim form, or other Individual request or demand for property, services, or money constitutes a separate Claim.

(3) A Claim will be considered Made to the Authority, recipient, or party when such Claim is actually Made to an agent, fiscal intermediary, or other entity, including any State or political subdivision thereof, acting for or on behalf of the Authority, recipient, or party.

(4) Each Claim for property, services, or money is subject to a civil penalty regardless of whether such property, services, or money is actually delivered or paid.

(5) If the Government has Made any payment (including transferred property or provided services) on a Claim, a Person subject to a civil penalty under paragraph (a)(1) of this section will also be subject to an assessment of not more than twice the amount of such Claim or that portion thereof that is determined to be in violation of paragraph (a)(1) of this section. Such assessment will be in lieu of damages sustained by the Government because of such Claim.

(b) *Statements*. (1) Except as provided in paragraph (c) of this section, a Person will be subject, in addition to any other remedy that may be prescribed by law, to a civil penalty of not more than $5,500 (as adjusted in accordance with the Federal Civil Penalties Inflation Adjustment Act of 1990 (Public Law 101–140), as amended by the Debt Collection Improvement Act of 1996 (Public Law 104–134)) if such Person Makes a written Statement that:

(i) The Person Knows or Has Reason to Know:

(A) Asserts a material fact that is false, fictitious, or fraudulent; or

(B) Is false, fictitious, or fraudulent because it omits a material fact that the Person Making the Statement has a duty to include in such Statement; and

(ii) Contains, or is accompanied by, an express certification or affirmation of the truthfulness and accuracy of the contents of the Statement.

(2) Each written representation, certification, or affirmation constitutes a separate Statement.

(3) A Statement will be considered Made to the Authority when such Statement is actually Made to an agent, fiscal intermediary, or other entity, including any State or political subdivision thereof, acting for or on behalf of the Authority.

(c) *Specific intent not required*. No proof of specific intent to defraud is required to establish liability under this section.

(d) *More than one Person liable*. (1) In any case in which it is determined that more than one Person is liable for Making a Claim or Statement under this section, each such Person may be held liable for a civil penalty under this section.

(2) In any case in which it is determined that more than one Person is liable for Making a Claim under this section on which the Government has Made payment (including transferred property or provided services), an assessment may be imposed against any such Person or jointly and severally against any combination of such Persons.

§ 13.4 Investigation.

(a) If an Investigating Official concludes that a subpoena pursuant to the Authority conferred by 31 U.S.C. 3804(a) is warranted:

(1) The subpoena so issued will notify the Person to whom it is addressed of the Authority under which the subpoena is issued and will identify the records or Documents sought;

(2) The Investigating Official may designate a Person to act on his or her behalf to receive the Documents sought; and

(3) The Person receiving such subpoena will be required to tender to the

Investigating Official or the Person designated to receive the Documents a certification that the Documents sought have been produced, or that such Documents are not available and the reasons therefore, or that such Documents, suitably identified, have been withheld based upon the assertion of an identified privilege.

(b) If the Investigating Official concludes that an action under the Act may be warranted, the Investigating Official will submit a report containing the findings and conclusions of such investigation to the Reviewing Official.

(c) Nothing in this section will preclude or limit an Investigating Official's discretion to refer allegations directly to the Department of Justice for suit under the False Claims Act or other civil relief, or to defer or postpone a report or referral to the Reviewing Official to avoid interference with a criminal investigation or prosecution.

(d) Nothing in this section modifies any responsibility of an Investigating Official to report violations of criminal law to the Attorney General.

§ 13.5 Review by the Reviewing Official.

(a) If, based on the report of the Investigating Official under § 13.4(b), the Reviewing Official determines that there is adequate evidence to believe that a Person is liable under § 13.3, the Reviewing Official will transmit to the Attorney General a written notice of the Reviewing Official's intention to issue a Complaint under § 13.7.

(b) Such notice will include:

(1) A Statement of the Reviewing Official's reasons for issuing a Complaint;

(2) A Statement specifying the evidence that supports the allegations of liability;

(3) A description of the Claims or Statements upon which the allegations of liability are based;

(4) An estimate of the amount of money or the value of property, services, or other Benefits requested or demanded in violation of § 13.3;

(5) A Statement of any exculpatory or mitigating circumstances that may relate to the Claims or Statements known by the Reviewing Official or the Investigating Official; and

(6) A Statement that there is a reasonable prospect of collecting an appropriate amount of penalties and assessments.

§ 13.6 Prerequisites for issuing a Complaint.

(a) The Reviewing Official may issue a Complaint under § 13.7 only if:

(1) The Department of Justice approves the issuance of a Complaint in a written Statement described in 31 U.S.C. 3803(b)(1); and

(2) In the case of allegations of liability under § 13.3(a) with respect to a Claim, the Reviewing Official determines that, with respect to such Claim or a group of related Claims submitted at the same time such Claim is submitted (as defined in paragraph (b) of this section), the amount of money or the value of property or services demanded or requested in violation of § 13.3(a) does not exceed $150,000.

(b) For the purposes of this section, a related group of Claims submitted at the same time will include only those Claims arising from the same transaction (e.g., grant, loan, application, or contract) that are submitted simultaneously as part of a single request, demand, or submission.

(c) Nothing in this section will be construed to limit the Reviewing Official's authority to join in a single Complaint against a Person's Claims that are unrelated or were not submitted simultaneously, regardless of the amount of money, or the value of property or services, demanded or requested.

§ 13.7 Complaint.

(a) On or after the date the Department of Justice approves the issuance of a Complaint in accordance with 31 U.S.C. 3803(b)(1), the Reviewing Official may serve a Complaint on the Defendant, as provided in § 13.8.

(b) The Complaint will state:

(1) The allegations of liability against the Defendant, including the statutory basis for liability, an identification of the Claims or Statements that are the basis for the alleged liability, and the reasons why liability allegedly arises from such Claims or Statements;

(2) The maximum amount of penalties and assessments for which the Defendant may be held liable;

(3) Instructions for filing an answer to request a hearing, including a specific Statement of the Defendant's right to request a hearing by filing an answer and to be represented by a Representative; and

(4) That failure to file an answer within 30 days of service of the Complaint will result in the imposition of the maximum amount of penalties and assessments without right to appeal, as provided in § 13.10.

(5) That the Defendant may obtain copies of relevant material and exculpatory information pursuant to the process outlined in § 13.20.

(c) At the same time the Reviewing Official serves the Complaint, he or she will serve the Defendant with a copy of the regulations in this part.

§ 13.8 Service of Complaint.

(a) Service of a Complaint must be Made by certified or registered mail or by delivery in any manner authorized by Rule 4(d) of the Federal Rules of Civil Procedure. Service of a Complaint is complete upon receipt.

(b) Proof of service, stating the name and address of the Person on whom the Complaint was served, and the manner and date of service, may be Made by:

(1) Affidavit of the Individual serving the Complaint by delivery;

(2) A United States Postal Service return receipt card acknowledging receipt; or

(3) Written acknowledgment of receipt by the Defendant or his or her Representative; or

(4) In case of service abroad, authentication in accordance with the Convention on Service Abroad of Judicial and Extrajudicial Documents in Commercial and Civil Matters.

§ 13.9 Answer.

(a) The Defendant may request a hearing by serving an answer on the Reviewing Official within 30 days of service of the Complaint. Service of an answer will be Made by delivering a copy to the Reviewing Official or by placing a copy in the United States mail, postage prepaid and addressed to the Reviewing Official. Service of an answer is complete upon such delivery or mailing. An answer will be deemed to be a request for hearing.

(b) In the answer, the Defendant:

(1) Will admit or deny each of the allegations of liability Made in the Complaint;

(2) Will state any defense on which the Defendant intends to rely;

(3) May state any reasons why the Defendant contends that the penalties and assessments should be less than the statutory maximum; and

(4) Will state the name, address, and telephone number of the Person authorized by the Defendant to act as Defendant's Representative, if any.

(c) If the Defendant is unable to file an answer meeting the requirements of paragraph (b) of this section within the time provided, the Defendant may, before the expiration of 30 days from service of the Complaint, serve on the Reviewing Official a general answer denying liability and requesting a hearing, and a request for an extension of time within which to serve an answer meeting the requirements of paragraph (b) of this section. The Reviewing Official will file promptly the Complaint, the general answer denying liability, and the request for an extension of time as provided in § 13.11. For good cause shown, the ALJ may grant the Defendant up to 30 additional days from the original due date within which to serve an answer meeting the requirements of paragraph (b) of this section.

§ 13.10 Default upon failure to answer.

(a) If the Defendant does not answer within the time prescribed in § 13.9(a), the Reviewing Official may refer the Complaint to an ALJ by filing the Complaint and a Statement that Defendant has failed to answer on time.

(b) Upon the referral of the Complaint, the ALJ will promptly serve on Defendant in the manner prescribed in § 13.8, a notice that an Initial Decision will be issued under this section.

(c) In addition, the ALJ will assume the facts alleged in the Complaint to be true, and, if such facts establish liability under § 13.3, the ALJ will issue an Initial Decision imposing the maximum amount of penalties and assessments allowed under the statute.

(d) Except as otherwise provided in this section, by failing to answer on time, the Defendant waives any right to further review of the penalties and assessments imposed under paragraph (c) of this section, and the Initial Decision will become final and binding upon the parties 30 days after it is issued.

(e) If, before such an Initial Decision becomes final, the Defendant files a motion seeking to reopen on the grounds that extraordinary circumstances prevented the Defendant from answering, the Initial Decision will be stayed pending the ALJ's decision on the motion.

(f) If, on such motion, the Defendant can demonstrate extraordinary circumstances excusing the failure to answer on time, the ALJ will withdraw the Initial Decision in paragraph (c) of this section, if such a decision has been issued, and will grant the Defendant an opportunity to answer the Complaint.

(g) A decision of the ALJ denying a Defendant's motion under paragraph (e) of this section is not subject to reconsideration under § 13.38.

(h) The Defendant may appeal to the Authority Head the decision denying a motion to reopen by filing a notice of appeal in accordance with § 13.26 within 15 days after the ALJ denies the motion. The timely filing of a notice of appeal will stay the Initial Decision until the Authority Head decides the issue.

(i) If the Defendant files a timely notice of appeal with the Authority Head, the ALJ will forward the record of the proceeding to the Authority Head.

(j) The Authority Head will decide expeditiously whether extraordinary circumstances excuse the Defendant's failure to answer on time based solely on the record before the ALJ.

(k) If the Authority Head decides that extraordinary circumstances excused the Defendant's failure to answer on time, the Authority Head will remand the case to the ALJ with instructions to grant the Defendant an opportunity to answer.

(l) If the Authority Head decides that the Defendant's failure to answer on time is not excused, the Authority Head will reinstate the Initial Decision of the ALJ, which will become final and binding upon the parties 30 days after the Authority Head issues such decision.

§ 13.11 Referral of Complaint and answer to the ALJ.

Upon receipt of an answer, the Reviewing Official will refer the matter to an ALJ by filing the Complaint and answer in accordance with § 13.26.

§ 13.12 Notice of hearing.

(a) When the ALJ receives the Complaint and answer, the ALJ will promptly serve a notice of hearing upon the Defendant in the manner prescribed by § 13.8.

(b) Such notice will include:

(1) The tentative time and place, and the nature of the hearing;

(2) The legal authority and jurisdiction under which the hearing is to be held;

(3) The matters of fact and law to be asserted;

(4) A description of the procedures for the conduct of the hearing;

(5) The name, address, and telephone number of the Representative of the Government and of the Defendant, if any; and

(6) Such other matters as the ALJ deems appropriate.

§ 13.13 Parties to the hearing.

(a) The parties to the hearing will be the Defendant and the Authority.

(b) Pursuant to 31 U.S.C. 3730(c)(5), a private plaintiff under the False Claims Act may participate in these proceedings to the extent authorized by the provisions of that Act.

§ 13.14 Separation of functions.

(a) The Investigating Official, the Reviewing Official, and any employee or agent of the Authority who takes part in investigating, preparing, or presenting a particular case may not, in such case or a factually related case:

(1) Participate in the hearing as the ALJ;

(2) Participate or advise in the Initial Decision or the review of the Initial Decision by the Authority Head, except as a witness or a Representative in public proceedings; or

(3) Make the collection of penalties and assessments under 31 U.S.C. 3806.

(b) The ALJ will not be responsible to, or subject to the supervision or direction of, the Investigating Official or the Reviewing Official.

(c) Except as provided in paragraph (a) of this section, the Representative for the Government may be employed anywhere in the Authority, including in the offices of either the Investigating Official or the Reviewing Official.

§ 13.15 *Ex parte* contacts.

No party or Person (except employees of the ALJ's office) will communicate in any way with the ALJ on any matter at issue in a case, unless on notice and opportunity for all parties to participate. This provision does not prohibit a Person or party from inquiring about the status of a case or asking routine questions concerning administrative functions or procedures.

§ 13.16 Disqualification of Reviewing Official or ALJ.

(a) A Reviewing Official or ALJ in a particular case may disqualify himself or herself at any time.

(b) A party may file a motion for disqualification of a Reviewing Official or an ALJ. Such motion will be accompanied by an affidavit alleging personal bias or other reason for disqualification.

(c) Such motion and affidavit will be filed promptly upon the party's discovery of reasons requiring disqualification, or such objections will be deemed waived.

(d) Such affidavit will state specific facts that support the party's belief that personal bias or other reason for disqualification exists and the time and circumstances of the party's discovery of such facts. It will be accompanied by a certificate of the Representative of record that it is Made in good faith.

(e)(1) If the ALJ determines that a Reviewing Official is disqualified, the ALJ will dismiss the Complaint without prejudice.

(2) If the ALJ disqualifies himself or herself, the case will be reassigned promptly to another ALJ.

(3) If the ALJ denies a motion to disqualify, the Authority Head may determine the matter only as part of his or her review of the Initial Decision upon appeal, if any.

§ 13.17 Rights of parties.

Except as otherwise limited by this part, all parties may:

(a) Be accompanied, represented, and advised by a Representative;

(b) Participate in any conference held by the ALJ;

(c) Conduct discovery;

(d) Agree to stipulations of fact or law, which will be Made part of the record;

(e) Present evidence relevant to the issues at the hearing;

(f) Present and cross-examine witnesses;

(g) Present oral arguments at the hearing as permitted by the ALJ; and

(h) Submit written briefs and proposed findings of fact and conclusions of law after the hearing.

§ 13.18 Authority of the ALJ.

(a) The ALJ will conduct a fair and impartial hearing, avoid delay, maintain order, and assure that a record of the proceeding is Made.

(b) The ALJ has the authority to:

(1) Set and change the date, time, and place of the hearing upon reasonable notice to the parties;

(2) Continue or recess the hearing in whole or in part for a reasonable period of time;

(3) Hold conferences to identify or simplify the issues, or to consider other matters that may aid in the expeditious disposition of the proceeding;

(4) Administer oaths and affirmations;

(5) Issue subpoenas requiring the attendance of witnesses and the production of Documents at depositions or at hearings;

(6) Rule on motions and other procedural matters;

(7) Regulate the scope and timing of discovery;

(8) Regulate the course of the hearing and the conduct of Representatives and parties;

(9) Examine witnesses;

(10) Receive, rule on, exclude, or limit evidence;

(11) Upon motion of a party, take official notice of facts;

(12) Upon motion of a party, decide cases, in whole or in part, by summary judgment where there is no disputed issue of material fact;

(13) Conduct any conference, argument, or hearing on motions in Person or by telephone; and

(14) Exercise such other authority as is necessary to carry out the responsibilities of the ALJ under this part.

(c) The ALJ does not have the authority to Make any determinations regarding the validity of treaties or other international agreements, Federal statutes or regulations, or Departmental Orders or Directives.

§ 13.19 Prehearing conferences.

(a) The ALJ may schedule prehearing conferences as appropriate.

(b) Upon the motion of any party, the ALJ will schedule at least one prehearing conference at a reasonable time in advance of the hearing.

(c) The ALJ may use prehearing conferences to discuss the following:

(1) Simplification of the issues;

(2) The necessity or desirability of amendments to the pleadings, including the need for a more definite Statement;

(3) Stipulations and admissions of fact or as to the contents and authenticity of Documents;

(4) Whether the parties can agree to submission of the case on a stipulated record;

(5) Whether a party chooses to waive appearance at an oral hearing and to submit only documentary evidence (subject to the objection of other parties) and written argument;

(6) Limitation of the number of witnesses;

(7) Scheduling dates for the exchange of witness lists and of proposed exhibits;

(8) Discovery;

(9) The time and place for the hearing; and

(10) Such other matters as may tend to expedite the fair and just disposition of the proceedings.

(d) The ALJ may issue an order containing all matters agreed upon by the parties or ordered by the ALJ at a prehearing conference.

§ 13.20 Disclosure of Documents.

(a) Upon written request to the Reviewing Official, the Defendant may review, at a time and place convenient to the Authority, any relevant and material Documents, transcripts, records, and other materials that relate to the allegations set out in the Complaint and upon which the findings and conclusions of the Investigating Official under § 13.4(b) are based, unless such Documents are subject to a privilege under Federal law. Special arrangements as to confidentiality may be required by the Reviewing Official, who may also assert privilege or other related doctrines. Upon payment of fees for duplication, the Defendant may obtain copies of such Documents.

(b) Upon written request to the Reviewing Official, the Defendant also may obtain a copy of all exculpatory information in the possession of the Reviewing Official or Investigating Official relating to the allegations in the Complaint, even if it is contained in a Document that would otherwise be privileged. If the Document would otherwise be privileged, only that portion containing exculpatory information must be disclosed.

(c) The notice sent to the Attorney General from the Reviewing Official as described in § 13.5 is not discoverable under any circumstances.

(d) The Defendant may file a motion to compel disclosure of the Documents subject to the provisions of this section. Such a motion may only be filed following the serving of an answer pursuant to § 13.9.

§ 13.21 Discovery.

(a) *In general.* (1) The following types of discovery are authorized:

(i) Requests for production of Documents for inspection and copying;

(ii) Requests for admissions of the authenticity of any relevant Document or of the truth of any relevant fact;

(iii) Written interrogatories; and

(iv) Depositions.

(2) Unless mutually agreed to by the parties, discovery is available only as ordered by the ALJ. The ALJ will regulate the timing of discovery.

(b) *Documents defined.* (1) For the purpose of this section and §§ 13.22 and

13.23, the term *Documents* includes information, documents, reports, answers, records, accounts, papers, and other data and documentary evidence.

(2) Nothing in this part will be interpreted to require the creation of a Document.

(c) *Motions for discovery*. (1) A party seeking discovery may file a motion. Such a motion will be accompanied by a copy of the request for production of Documents, request for admissions, or interrogatories or, in the case of depositions, a summary of the scope of the proposed deposition.

(2) Within ten days of service, a party may file an opposition to the motion or a motion for protective order as provided in § 13.24.

(3) The ALJ may grant a motion for discovery only if he or she finds that the discovery sought:

(i) Is necessary for the expeditious, fair, and reasonable consideration of the issues;

(ii) Is not unduly costly or burdensome;

(iii) Will not unduly delay the proceeding; and

(iv) Does not seek privileged information.

(4) The burden of showing that discovery should be allowed is on the party seeking discovery.

(5) The ALJ may grant discovery subject to a protective order under § 13.24.

(d) *Depositions*. (1) If a motion for deposition is granted, the ALJ will issue a subpoena for the deponent, which may require the deponent to produce Documents. The subpoena will specify the time and place at which the deposition will be held. Deposition requests for senior level DHS officials (including career and non-career senior executive level employees) shall not be approved absent showing of compelling need that cannot be met by any other means.

(2) The party seeking to depose will serve the subpoena in the manner prescribed in § 13.8.

(3) The deponent may file a motion to quash the subpoena or a motion for a protective order within ten days of service. If the ALJ has not acted on such a motion by the return date, such date will be suspended pending the ALJ's final action on the motion.

(4) The party seeking to depose will provide for the taking of a verbatim transcript of the deposition, which it will Make available to all other parties for inspection and copying.

(e) Each party will bear its own costs of discovery.

§ 13.22 Exchange of witness lists, Statements, and exhibits.

(a) At least 15 days before the hearing or at such other time as may be ordered by the ALJ, the parties will exchange witness lists, copies of prior Statements of proposed witnesses, and copies of proposed hearing exhibits, including copies of any written Statements that the party intends to offer in lieu of live testimony in accordance with § 13.33(b). At the time the above Documents are exchanged, any party that intends to rely on the transcript of deposition testimony in lieu of live testimony at the hearing, if permitted by the ALJ, will provide each party with a copy of the specific pages of the transcript it intends to introduce into evidence.

(b) If a party objects, the ALJ will not admit into evidence the testimony of any witness whose name does not appear on the witness list of any exhibit not provided to the opposing party as provided above unless the ALJ finds good cause for the failure or that there is no prejudice to the objecting party.

(c) Unless another party objects within the time set by the ALJ, Documents exchanged in accordance with paragraph (a) of this section will be deemed to be authentic for the purpose of admissibility at the hearing.

§ 13.23 Subpoenas for attendance at hearing.

(a) A party wishing to procure the appearance and testimony of any Individual at the hearing may request that the ALJ issue a subpoena. Requests for witness testimony of senior level DHS officials (including career and non-career senior executive level employees) shall not be approved absent a showing of compelling need that cannot be met by any other means.

(b) A subpoena requiring the attendance and testimony of an Individual may also require the Individual to produce Documents at the hearing.

(c) A party seeking a subpoena will file a written request therefore not less than 15 days before the date fixed for the hearing unless otherwise allowed by the ALJ for good cause shown. Such request will be accompanied by a proposed subpoena, which will specify and Documents to be produced and will designate the witnesses and describe the address and location thereof with sufficient particularity to permit such witnesses to be found.

(d) The subpoena will specify the time and place at which the witness is to appear and any Documents the witness is to produce.

(e) The party seeking the subpoena will serve it in the manner prescribed in § 13.8. A subpoena on a party or upon an Individual under the control of party may be served by first class mail.

(f) A party or the Individual to whom the subpoena is directed may file a motion to quash the subpoena within ten days after service or on or before the time specified in the subpoena for compliance if it is less than ten days after service. If the ALJ has not acted on such a motion by the return date, such date will be suspended pending the ALJ's final action on the motion.

§ 13.24 Protective order.

(a) A party or a prospective witness or deponent may file a motion for a protective order with respect to discovery sought by an opposing party or with respect to the hearing, seeking to limit the availability or disclosure of evidence.

(b) In issuing a protective order, the ALJ may Make any order that justice requires to protect a party or Person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(1) That the discovery not be had;

(2) That the discovery may be had only on specified terms and conditions, including a designation of the time or place;

(3) That the discovery may be had only through a method of discovery other than that requested;

(4) That certain matters not be inquired into, or that the scope of discovery be limited to certain matters;

(5) That discovery be conducted with no one present except Persons designated by the ALJ;

(6) That the contents of discovery or evidence be sealed;

(7) That a deposition after being sealed be opened only by order of the ALJ;

(8) That a trade secret or other confidential research, development, commercial information, or facts pertaining to any criminal investigation, proceeding, or other administrative investigation not be disclosed or be disclosed only in a designated way; and

(9) That the parties simultaneously submit to the ALJ specified Documents or information enclosed in sealed envelopes to be opened as directed by the ALJ.

§ 13.25 Fees.

The party requesting a subpoena will pay the cost of the fees and mileage of any witness subpoenaed in the amounts that would be payable to a witness in a proceeding in United States District Court. A check for witness fees and mileage will accompany the subpoena when served, except that when a subpoena is issued on behalf of the Authority, a check for witness fees and mileage need not accompany the subpoena.

§ 13.26 Filing, form and service of papers.

(a) *Filing and form.* (1) Documents filed with the ALJ will include an original and two copies.

(2) Every pleading and paper filed in the proceeding will contain a caption setting forth the title of the action, the case number assigned by the ALJ, and a designation of the paper (*e.g.*, Motion to Quash Subpoena).

(3) Every pleading and paper will be signed by, and will contain the address and telephone number of, the party or the Person on whose behalf the paper was filed, or his or her Representative.

(4) Papers are considered filed when they are mailed. Date of mailing may be established by a certificate from the party or its Representative or by proof that the Document was sent by certified or registered mail.

(b) *Service.* A party filing a Document will, at the time of filing, serve a copy of such Document on every other

party. Service upon any party of any Document other than those required to be served as prescribed in § 13.8 will be Made by delivering a copy, or by placing a copy of the Document in the United States mail, postage prepaid and addressed, to the party's last known address. When a party is represented by a Representative, service will be Made upon such Representative in lieu of the actual party.

(c) *Proof of service.* A certificate of the Individual serving the Document by Personal delivery or by mail, setting forth the manner of service, will be proof of service.

§ 13.27 Computation of time.

(a) In computing any period of time under this part or in an order issued thereunder, the time begins with the day following the act, event, or default, and includes the last day of the period, unless it is a Saturday, Sunday, or legal holiday observed by the Federal Government, in which event it includes the next business day.

(b) When the period of time allowed is less than seven days, intermediate Saturdays, Sundays, and legal holidays observed by the Federal Government will be excluded from the computation.

(c) Where a Document has been served or issued by placing it in the United States mail, an additional five days will be added to the time permitted for any responses.

§ 13.28 Motions.

(a) Any application to the ALJ for an order or ruling will be by motion. Motions will state the relief sought, the authority relied upon, and the facts alleged, and will be filed and served on all other parties.

(b) Except for motions Made during a prehearing conference or at the hearing, all motions will be in writing. The ALJ may require that oral motions be reduced to writing.

(c) Within 15 days after a written motion is served, or such other time as may be fixed by the ALJ, any party may file a response to such motion.

(d) The ALJ may not grant a written motion before the time for filing response thereto has expired, except upon consent of the parties or following a hearing on the motion, but may overrule or deny such motion without awaiting a response.

(e) The ALJ will Make a reasonable effort to dispose of all outstanding motions before the hearing begins.

(f) Except as provided by §§ 13.21(e)(3) and 13.23(f), which concern subpoenas, the filing or pendency of a motion will not automatically alter or extend a deadline or return date.

§ 13.29 Sanctions.

(a) The ALJ may sanction a Person, including any party or Representative, for:

(1) Failing to comply with an order, rule, or procedure governing the proceeding;

(2) Failing to prosecute or defend an action; or

(3) Engaging in other misconduct that interferes with the speedy, orderly, or fair conduct of the hearing.

(b) Sanctions include but are not limited to those specifically set forth in paragraphs (c), (d), and (e) of this section. Any such sanction will reasonably relate to the severity and nature of the failure or misconduct.

(c) When a party fails to comply with an order, including an order for taking a deposition, the production of evidence within the party's control, or a request for admission, the ALJ may:

(1) Draw an inference in favor of the requesting party with regard to the information sought;

(2) In the case of requests for admission, deem each matter of which an admission is requested to be admitted;

(3) Prohibit the party failing to comply with such order from introducing evidence concerning, or otherwise relying upon, testimony relating to the information sought; and

(4) Strike any part of the pleadings or other submissions of the party failing to comply with such request.

(d) If a party fails to prosecute or defend an action under this part begun by service of a notice of hearing, the ALJ may dismiss the action or may issue an Initial Decision imposition penalties and assessments.

(e) The ALJ may refuse to consider any motion, request, response, brief or other Document that is not filed in a timely fashion.

§ 13.30 The hearing and burden of proof.

(a) The ALJ will conduct a hearing on the record in order to determine whether the Defendant is liable for a civil penalty or assessment under § 13.3 and, if so, the appropriate amount of any such civil penalty or assessment considering any aggravating or mitigating factors.

(b) The Authority will prove Defendant's liability and any aggravating factors by a preponderance of the evidence.

(c) The Defendant will prove any affirmative defenses and any mitigating factors by a preponderance of the evidence.

(d) The hearing will be open to the public unless otherwise ordered by the ALJ for good cause shown.

§ 13.31 Determining the amount of penalties and assessments.

(a) In determining an appropriate amount of civil penalties and assessments, the ALJ and the Authority Head, upon appeal, should evaluate any circumstances that mitigate or aggravate the violation and should articulate in their opinions the reasons that support the penalties and assessments they impose. Because of the intangible costs of fraud, the expense of investigating such conduct, and the need to deter others who might be similarly tempted, ordinarily double damages and a significant civil penalty should be imposed.

(b) Although not exhaustive, the following factors are among those that may influence the ALJ and the Authority Head in determining the amount of penalties and assessments to impose with respect to the misconduct (i.e., the false fictitious, of fraudulent Claims or Statements) charged in the Complaint:

(1) The number of false, fictitious, or fraudulent Claims or Statements;

(2) The time period over which such Claims or Statements were Made;

(3) The degree of the Defendant's culpability with respect to the misconduct;

(4) The amount of money or the value of the property, services, or Benefit falsely claimed;

(5) The value of the Government's actual loss as a result of the misconduct, including foreseeable consequential damages and the costs of investigation;

(6) The relationship of the amount imposed as civil penalties to the amount of the Government's loss;

(7) The potential or actual impact of the misconduct upon national defense, public health or safety, or public confidence in the management of Government programs and operations, including particularly the impact on the intended beneficiaries of such programs;

(8) Whether the Defendant has engaged in a pattern of the same or similar misconduct;

(9) Whether the Defendant attempted to conceal the misconduct;

(10) The degree to which the Defendant has involved others in the misconduct or in concealing it;

(11) Where the misconduct of employees or agents is imputed to the Defendant, the extent to which the Defendant's practices fostered or attempted to preclude such misconduct;

(12) Whether the Defendant cooperated in or obstructed an investigation of the misconduct;

(13) Whether the Defendant assisted in identifying and prosecuting other wrongdoers;

(14) The complexity of the program or transaction, and the degree of the Defendant's sophistication with respect to it, including the extent of the Defendant's prior participation in the program or in similar transactions;

(15) Whether the Defendant has been found, in any criminal, civil, or administrative proceeding to have engaged in similar misconduct or to have dealt dishonestly with the Government of the United States or of a State, directly or indirectly; and

(16) The need to deter the Defendant and others from engaging in the same or similar misconduct.

(c) Nothing in this section will be construed to limit the ALJ or the Authority Head from considering any other factors that in any given case may mitigate or aggravate the offense for which penalties and assessments are imposed.

§ 13.32 Location of hearing.

(a) The hearing may be held:

(1) In any judicial district of the United States in which the Defendant resides or transacts business;

(2) In any judicial district of the United States in which the Claim or Statement in issue was Made; or

(3) In such other place as may be agreed upon by the Defendant and the ALJ.

(b) Each party will have the opportunity to present written and oral argument with respect to the location of the hearing.

(c) The hearing will be held at the place and at the time ordered by the ALJ.

§ 13.33 Witnesses.

(a) Except as provided in paragraph (b) of this section, testimony at the hearing will be given orally by witnesses under oath or affirmation.

(b) At the discretion of the ALJ, testimony may be admitted in the form of a written Statement or deposition. Any such written Statement must be provided to all other parties along with the last known address of such witness, in a manner that allows sufficient time for other parties to subpoena such witness for cross-examination at the hearing. Prior written Statements of witnesses proposed to testify at the hearing and deposition transcripts will be exchanged as provided in § 13.22(a).

(c) The ALJ will exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to:

(1) Make the interrogation and presentation effective for the ascertainment of the truth;

(2) Avoid needless consumption of time; and

(3) Protect witnesses from harassment or undue embarrassment.

(d) The ALJ will permit the parties to conduct such cross-examination as may be required for a full and true disclosure of the facts.

(e) At the discretion of the ALJ, a witness may be cross-examined on matters relevant to the proceeding without regard to the scope of his or her direct examination. To the extent permitted by the ALJ, cross-examination on matters outside the scope of direct examination will be conducted in the manner of direct examination and may proceed by leading questions only if the witness is a hostile witness, an adverse party, or a witness identified with an adverse party.

(f) Upon motion of any party, the ALJ will order witnesses excluded so that they cannot hear the testimony of other witnesses. This rule does not authorize exclusion of:

(1) A party who is an Individual;

(2) In the case of a party that is not an Individual, an officer or employee of the party;

(i) Appearing for the entity pro se; or

(ii) Designated by the party's Representative; or

(3) An Individual whose presence is shown by a party to be essential to the presentation of its case, including an Individual employed by the Government engaged in assisting the Representative for the Government.

§ 13.34 Evidence.

(a) The ALJ will determine the admissibility of evidence.

(b) Except as provided in this part, the ALJ will not be bound by the Federal Rules of Evidence. However, the ALJ may apply the Federal Rules of Evidence where appropriate, e.g., to exclude unreliable evidence.

(c) The ALJ will exclude irrelevant and immaterial evidence.

(d) Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or by considerations of undue delay or needless presentation of cumulative evidence.

(e) Although relevant, evidence may be excluded if it is privileged under Federal law.

(f) Evidence concerning offers of compromise or settlement will be inadmissible to the extent provided in Rule 408 of the Federal Rules of Evidence.

(g) The ALJ will permit the parties to introduce rebuttal witnesses and evidence.

(h) All Documents and other evidence offered or taken for the record will be open to examination by all parties, unless otherwise ordered by the ALJ pursuant to § 13.24.

§ 13.35 The record.

(a) The hearing will be recorded and transcribed. Transcripts may be obtained following the hearing from the ALJ at a cost not to exceed the actual cost of duplication.

(b) The transcript of testimony, exhibits and other evidence admitted at the hearing, and all papers and requests filed in the proceeding constitute the record for the decision by the ALJ and the Authority Head.

(c) The record may be inspected and copied (upon payment of a reasonable fee) by anyone, unless otherwise ordered by the ALJ pursuant to § 13.24.

§ 13.36 Post-hearing briefs.

The ALJ may require the parties to file post-hearing briefs. In any event, any party may file a post-hearing brief. The ALJ will fix the time for filing such briefs. Such briefs may be accompanied by proposed findings of fact and conclusions of law. The ALJ may permit the parties to file reply briefs.

§ 13.37 Initial Decision.

(a) The ALJ will issue an Initial Decision based only on the record, which will contain findings of fact, conclusions of law, and the amount of any penalties and assessments imposed.

(b) The findings of fact will include a finding on each of the following issues:

(1) Whether the Claims or Statements identified in the Complaint, or any portions thereof, violate § 13.3;

(2) If the Person is liable for penalties or assessments, the appropriate amount of any such penalties or assessments considering any mitigating or aggravating factors that he or she finds in the case, such as those described in § 13.31.

(c) The ALJ will promptly serve the Initial Decision on all parties within 90 days after the time for submission of post-hearing briefs and reply briefs (if permitted) has expired. The ALJ will at the same time serve all parties with a Statement describing the right of any Defendant determined to be liable for a civil penalty or assessment to file a motion for reconsideration with the ALJ or a notice of appeal with the Authority Head. If the ALJ fails to meet the deadline contained in this paragraph, he or she will notify the parties of the reason for the delay and will set a new deadline.

(d) Unless the Initial Decision of the ALJ is timely appealed to the Authority Head, or a motion for reconsideration of the Initial Decision is timely filed, the Initial Decision will constitute the final decision of the Authority Head and will be final and binding on the parties 30 days after it is issued by the ALJ.

§ 13.38 Reconsideration of Initial Decision.

(a) Except as provided in paragraph (d) of this section, any party may file a motion for reconsideration of the Initial Decision within 20 days of receipt of the Initial Decision. If service was Made by mail, receipt will be presumed to be five days from the date of mailing in the absence of contrary proof.

(b) Every such motion must set forth the matters claimed to have been erroneously decided and the nature of the alleged errors. Such motion will be accompanied by a supporting brief.

(c) Responses to such motions will be allowed only upon request of the ALJ.

(d) No party may file a motion for reconsideration of an Initial Decision that has been revised in response to a previous motion for reconsideration.

(e) The ALJ may dispose of a motion for reconsideration by denying it or by issuing a revised Initial Decision.

(f) If the ALJ denies a motion for reconsideration, the Initial Decision will constitute the final decision of the Authority Head and will be final and binding on the parties 30 days after the ALJ denies the motion, unless the Initial Decision is timely appealed to the Authority Head in accordance with § 13.39.

(g) If the ALJ issues a revised Initial Decision, that decision will constitute the final decision of the Authority Head and will be final and binding on the parties 30 days after it is issued, unless it is timely appealed to the Authority Head in accordance with § 13.39.

§ 13.39 Appeal to Authority Head.

(a) Any Defendant who has served a timely answer and who is determined in an Initial Decision to be liable for a civil penalty or assessment may appeal such decision to the Authority Head by

filing a notice of appeal in accordance with this section and § 13.26.

(b)(1) A notice of appeal may be filed at any time within 30 days after the ALJ issues an Initial Decision. However, if another party files a motion for reconsideration under § 13.38, consideration of the appeal will be stayed automatically pending resolution of the motion for reconsideration.

(2) If a Defendant files a timely motion for reconsideration, a notice of appeal may be filed within 30 days after the ALJ denies the motion or issues a revised Initial Decision, whichever applies.

(3) The Authority Head may extend the initial 30-day period for an additional 30 days if the Defendant files with the Authority Head a request for an extension within the initial 30-day period and shows good cause.

(c) If the Defendant files a timely notice of appeal and the time for filing motions for reconsideration under § 13.38 has expired, the ALJ will forward two copies of the notice of appeal to the Authority Head, and will forward or Make available the record of the proceeding to the Authority Head.

(d) A notice of appeal will be accompanied by a written brief specifying exceptions to the Initial Decision and reasons supporting the exceptions.

(e) The Representative for the Government may file a brief in opposition to exceptions within 30 days of receiving the notice of appeal and accompanying brief.

(f) There is no right to appear personally before the Authority Head.

(g) There is no right to appeal any interlocutory ruling by the ALJ.

(h) In reviewing the Initial Decision, the Authority Head will not consider any objection that was not raised before the ALJ unless a demonstration is Made of extraordinary circumstances causing the failure to raise the objection.

(i) If any party demonstrates to the satisfaction of the Authority Head that additional evidence not presented at such hearing is material and that there were reasonable grounds for the failure to present such evidence at such hearing, the Authority Head will remand the matter to the ALJ for consideration of such additional evidence.

(j) The Authority Head may affirm, reduce, reverse, compromise, remand, or settle any penalty or assessment determined by the ALJ in any Initial Decision.

(k) The Authority Head will promptly serve each party to the appeal with a copy of the decision of the Authority Head and with a Statement describing the right of any Person determined to be liable for a penalty or assessment to seek judicial review.

(l) Unless a petition for review is filed as provided in 31 U.S.C. 3805 after a Defendant has exhausted all administrative remedies under this part and within 60 days after the date on which the Authority Head serves the Defendant with a copy of the Authority Head's decision, a determination that a Defendant is liable under § 13.3 is final and is not subject to judicial review.

§ 13.40 Stays ordered by the Department of Justice.

If at any time the Attorney General or an Assistant Attorney General designated by the Attorney General transmits to the Authority Head a written finding that continuation of the administrative process described in this part with respect to a Claim or Statement may adversely affect any pending or potential criminal or civil action related to such Claim or Statement, the Authority Head will stay the process immediately. The Authority Head may order the process resumed only upon receipt of the written authorization of the Attorney General.

§ 13.41 Stay pending appeal.

(a) An Initial Decision is stayed automatically pending disposition of a motion for reconsideration or of an appeal to the Authority Head.

(b) No administrative stay is available following a final decision of the Authority Head.

§ 13.42 Judicial review.

Section 3805 of title 31, United States Code, authorizes judicial review by an appropriate United States District Court of a final decision of the Authority Head imposing penalties or assessments under this part and specifies the procedures for such review.

§ 13.43 Collection of civil penalties and assessments.

Sections 3806 and 3808(b) of title 31, United States Code, authorize actions for collection of civil penalties and assessments imposed under this part and specify the procedures for such actions.

§ 13.44 Right to administrative offset.

The amount of any penalty or assessment that has become final, or for which a judgment has been entered under § 13.42 or § 13.43, or any amount agreed upon in a compromise or settlement under § 13.46, may be collected by administrative offset under 31 U.S.C. 3716, except that an administrative offset may not be Made under that subsection against a refund of an overpayment of Federal taxes, then or later owing by the United States to the Defendant.

§ 13.45 Deposit in Treasury of United States.

All amounts collected pursuant to this part will be deposited as miscellaneous receipts in the Treasury of the United States, except as provided in 31 U.S.C. 3806(g).

§ 13.46 Compromise or settlement.

(a) Parties may Make offers of compromise or settlement at any time.

(b) The Reviewing Official has the exclusive authority to compromise or settle a case under this part at any time after the date on which the Reviewing Official is permitted to issue a Complaint and before the date on which the ALJ issues an Initial Decision.

(c) The Authority Head has exclusive authority to compromise or settle a case under this part at any time after the date on which the ALJ issues an Initial Decision, except during the pendency of any review under § 13.42 or during the pendency of any action to collect penalties and assessments under § 13.43.

(d) The Attorney General has exclusive authority to compromise or settle a case under this part during the pendency of any review under § 13.42 or of any action to recover penalties and assessments under 31 U.S.C. 3806.

(e) The Investigating Official may recommend settlement terms to the Reviewing Official, the Authority Head, or the Attorney General, as appropriate. The Reviewing Official may recommend settlement terms to the Authority Head, or the Attorney General, as appropriate.

(f) Any compromise or settlement must be in writing and signed by all parties and their Representatives.

§ 13.47 Limitations.

(a) The notice of hearing with respect to a Claim or Statement must be served in the manner specified in § 13.8 within 6 years after the date on which such Claim or Statement is Made.

(b) If the Defendant fails to serve a timely answer, service of a notice under § 13.10(b) will be deemed a notice of hearing for purposes of this section.

(c) The statute of limitations may be extended by agreement of the parties.

PART 15—ENFORCEMENT OF NONDISCRIMINATION ON THE BASIS OF DISABILITY IN PROGRAMS OR ACTIVITIES CONDUCTED BY THE DEPARTMENT OF HOMELAND SECURITY

Sec.

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SOURCE: 68 FR 10886, Mar. 6, 2003, unless otherwise noted.

§ 15.1 Purpose.

The purpose of this part is to effectuate section 504 of the Rehabilitation Act of 1973 (''Section 504''), as amended by section 119 of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, which prohibits discrimination on

the basis of disability in programs or activities conducted by Executive agencies. The provisions established by this part shall be effective for all components of the Department, including all Department components that are transferred to the Department, except to the extent that a Department component already has existing section 504 regulations.

§ 15.2 Application.

This part applies to all programs or activities conducted by the Department of Homeland Security (Department), except for programs or activities conducted outside the United States that do not involve individuals with a disability in the United States.

§ 15.3 Definitions.

For purposes of this part:

(a) *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 Department. For example, auxiliary aids useful for persons with impaired vision include readers, materials in Braille, audio recordings and other similar services and devices. Auxiliary aids useful for persons with impaired hearing include telephone handset amplifiers, telephones compatible with hearing aids, telecommunications devices for deaf persons (TTYs), interpreters, notetakers, written materials and other similar services and devices.

(b) *Complete complaint* means a written statement that contains the complainant's name and address, and describes the Department's alleged discriminatory action in sufficient detail to inform the Department 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 of individuals with disabilities shall also identify (where possible) the alleged victims of discrimination.

(c) *Facility* means all or any portion of a building, structure, equipment, road, walk, parking lot, rolling stock, or other conveyance, or other real or personal property.

(d) *Individual with a disability* means any person who has a physical or mental impairment that substantially limits one or more of the individual's major life activities, has a record of such an impairment, or is regarded as having such an impairment. For purposes of this definition:

(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, drug addiction and alcoholism.

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

(3) *Has a record of such an impairment* means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more of the individual's 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 Department 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 (e)(1) of this section but is treated by the Department as having such an impairment.

(e) *Qualified individual with a disability* means:

(1) With respect to a Department program or activity under which a person is required to perform services or to achieve a level of accomplishment, an individual with a disability 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 Department can demonstrate would result in a fundamental alteration in the nature of the program; and

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

(3) With respect to employment, an individual with a disability who satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position.

(f) *Section 504* means section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), as amended. As used in this part, section 504 applies only to programs or activities conducted by Executive agencies and not to federally assisted programs.

§ 15.10 Self-evaluation.

(a) Except as provided in paragraph (d) of this section, the Department shall, not later than March 7, 2005, evaluate its current policies and practices, and the effects thereof, to determine if they meet the requirements of this part. To the extent modification of any such policy and practice is required, the Department shall proceed to make the necessary modifications.

(b) The Department shall provide an opportunity to interested persons, including individuals with a disability or organizations representing individuals with disabilities, to participate in the self-evaluation process.

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

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

(2) A description of any modifications made; and

(3) A list of participants in the self-evaluation process.

(d) If a component within the Department has already complied with the self-evaluation requirement of a regulation implementing section 504, then the requirements of this section shall apply to only those programs and activities conducted by that component that were not included in the previous self-evaluation.

§ 15.11 Notice.

The Department shall make available to all Department employees and interested persons information regarding the provisions of this part and its applicability to the programs or activities conducted by the Department, and make such information available to them in such a manner as is necessary to apprise them of the protections against discrimination assured them by section 504 and this part.

§ 15.30 General prohibitions against discrimination.

(a) No qualified individual with a disability in the United States, shall, by reason of his or her disability, be excluded from the participation in, be denied benefits of, or otherwise be subjected to discrimination under any program or activity conducted by the Department.

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

(i) Deny a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit, or service;

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

(iii) Provide a qualified individual with a disability with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit,

or to reach the same level of achievement as that provided to others;

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

(v) Deny a qualified individual with a disability the opportunity to participate as a member of planning or advisory boards; or

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

(2) For purposes of this part, aids, benefits, and services, to be equally effective, are not required to produce the identical result or level of achievement for individuals with a disability and for nondisabled persons, but must afford individuals with a disability equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement in the most integrated setting appropriate to the individual's needs.

(3) Even if the Department is permitted, under paragraph (b)(1)(iv) of this section, to operate a separate or different program for individuals with a disability or for any class of individuals with a disability, the Department must permit any qualified individual with a disability who wishes to participate in the program that is not separate or different to do so.

(4) The Department may not, directly or through contractual or other arrangements, utilize criteria or methods of administration the purpose or effect of which would:

(i) Subject qualified individuals with a disability to discrimination on the basis of disability; or

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

(5) The Department may not, in determining the site or location of a facility, make selections the purpose or effect of which would:

(i) Exclude individuals with a disability from, deny them the benefits of, or otherwise subject them to discrimination under any program or activity conducted by the Department; or

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

(6) The Department, in the selection of procurement contractors, may not use criteria that subject qualified individuals with a disability to discrimination on the basis of disability.

(7) The Department may not administer a licensing or certification program in a manner that subjects qualified individuals with a disability to discrimination on the basis of disability, nor may the Department establish requirements for the programs or activities of licensees or certified entities that subject qualified individuals with a disability to discrimination on the basis of disability. However, the programs or activities of entities that are licensed or certified by the Department are not, themselves, covered by this part.

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

(d) The Department shall administer programs and activities in the most integrated setting appropriate to the needs of qualified individuals with a disability.

§ 15.40 Employment.

No qualified individual with a disability shall, on the basis of that disability, be subjected to discrimination in employment under any program or activity conducted by the Department. 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 1614, shall apply to employment of Federally conducted programs or activities.

§ 15.49 Program accessibility; discrimination prohibited.

Except as otherwise provided in § 15.50, no qualified individual with a disability shall, because the Department's facilities are inaccessible to or unusable by individuals with a disability, be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any program or activity conducted by the Department.

§ 15.50 Program accessibility; existing facilities.

(a) *General.* The Department shall operate each program or activity so that the program or activity, when viewed in its entirety, is readily accessible to and usable by individuals with a disability. This paragraph (a) does not require the Department:

(1) To make structural alterations in each of its existing facilities in order to make them accessible to and usable by individuals with a disability where other methods are effective in achieving compliance with this section; or

(2) 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 Department personnel believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the Department has the burden of proving that compliance with this paragraph (a) of this section would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the Secretary of Homeland Security (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 Department shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that individuals with a disability receive the benefits and services of the program or activity.

(b) *Methods.* The Department may comply with the requirements of this section through such means as redesign of equipment, reassignment of services to accessible buildings, assignment of aides to beneficiaries, home visits, delivery of services at alternate accessible sites, alteration of existing facilities and construction of new facilities, use of accessible rolling stock, or any other methods that result in making its programs or activities readily accessible to and usable by individuals with a disability. The Department, in making alterations to existing buildings, shall meet accessibility requirements to the extent required by the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151–4157), and any regulations implementing it. In choosing among available methods for meeting the requirements of this section, the Department shall give priority to those methods that offer programs and activities to qualified individuals with a disability in the most integrated setting appropriate.

(c) *Time period for compliance.* The Department shall comply with the obligations established under this section not later than May 5, 2003, except that where structural changes in facilities are undertaken, such changes shall be made not later than March 6, 2006, but in any event as expeditiously as possible. If a component within the Department has already complied with the accessibility requirements of a regulation implementing section 504, then the provisions of this paragraph shall apply only to facilities for that agency's programs and activities that were not previously made readily accessible to and usable by individuals with disabilities in compliance with that regulation.

(d) *Transition plan.* In the event that structural changes to facilities will be undertaken to achieve program accessibility, the Department shall develop not later than September 8, 2003, a transition plan setting forth the steps necessary to complete such changes. The Department shall provide an opportunity to interested persons, including individuals with disabilities or organizations representing individuals

with disabilities, to participate in the development of the transition plan by submitting comments (both telephonic and written). A copy of the transition plan shall be made available for public inspection. If a component of the Department has already complied with the transition plan requirement of a regulation implementing section 504, then the requirements of this paragraph shall apply only to the agency's facilities for programs and activities that were not included in the previous transition plan. The plan shall at a minimum:

(1) Identify physical obstacles in the Department's facilities that limit the physical accessibility of its programs or activities to individuals with disabilities;

(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.

§ 15.51 Program accessibility; new construction and alterations.

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

§ 15.60 Communications.

(a) The Department shall take appropriate steps to effectively communicate with applicants, participants, personnel of other Federal entities, and members of the public.

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

(i) In determining what type of auxiliary aid is necessary, the Department shall give primary consideration to the requests of the individual with a disability.

(ii) The Department need not provide individually prescribed devices, readers for personal use or study, or other devices of a personal nature to applicants or participants in programs.

(2) Where the Department communicates with applicants and beneficiaries by telephone, the Department shall use telecommunication devices for deaf persons (TTYs) or equally effective telecommunication systems to communicate with persons with impaired hearing.

(b) The Department shall make available to interested persons, including persons with impaired vision or hearing, information as to the existence and location of accessible services, activities, and facilities.

(c) The Department shall post notices at a primary entrance to each of its inaccessible facilities, directing users to an accessible facility, or 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 Department 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.

(e) In those circumstances where Department personnel believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the Department has the burden of proving that compliance with this section would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the Secretary of Homeland Security (or his or her designee) after considering all 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 Department shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that, to the maximum extent possible, individuals with a disability receive the benefits and services of the program or activity.

§ 15.70 Compliance procedures.

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

(b) The Department 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 1614.

(c) All other complaints alleging violations of section 504 may be sent to the Officer for Civil Rights and Civil Liberties, Department of Homeland Security, Washington, DC 20528. The Officer for Civil Rights and Civil Liberties shall be responsible for coordinating implementation of this section.

(d)(1) Any person who believes that he or she has been subjected to discrimination prohibited by this part may by him or herself, or by his or her authorized representative, file a complaint. Any person who believes that any specific class of persons has been subjected to discrimination prohibited by this part and who is a member of that class or the authorized representative of a member of that class may file a complaint.

(2) The Department shall accept and investigate all complete complaints over which it has jurisdiction.

(3) All complete complaints must be filed within 180 days of the alleged act of discrimination. The Department may extend this time period for good cause.

(e) If the Department 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 entity of the Federal government.

(f) The Department shall notify the Architectural and Transportation Barriers Compliance Board upon receipt of any complaint alleging that a building or facility that is subject to the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151–4157), is not readily accessible to and usable by individuals with disabilities.

(g)(1) Not later than 180 days from the receipt of a complete complaint over which it has jurisdiction, the Department shall notify the complainant of the results of the investigation in a letter containing:

(i) Findings of fact and conclusions of law;

(ii) A description of a remedy for each violation found; and

(iii) A notice of the right to appeal.

(2) Department employees are required to cooperate in the investigation and attempted resolution of complaints. Employees who are required to participate in any investigation under this section shall do so as part of their official duties and during the course of regular duty hours.

(3) If a complaint is resolved informally, the terms of the agreement shall be reduced to writing and made part of the complaint file, with a copy of the agreement provided to the complainant. The written agreement shall describe the subject matter of the complaint and any corrective action to which the parties have agreed.

(h) Appeals of the findings of fact and conclusions of law or remedies must be filed by the complainant not later than 60 days after receipt from the Department of the letter required by paragraph (g)(1) of this section. The Department may extend this time for good cause.

(i) Timely appeals shall be accepted and processed by the Officer for Civil Rights and Civil Liberties, or designee thereof, who will issue the final agency decision which may include appropriate corrective action to be taken by the Department.

(j) The Department shall notify the complainant of the results of the appeal within 30 days of the receipt of the appeal. If the Department determines that it needs additional information

from the complainant, it shall have 30 days from the date it received the additional information to make its determination on the appeal.

(k) The time limits cited in paragraphs (g) and (j) of this section may be extended for an individual case when the Officer for Civil Rights and Civil Liberties determines that there is good cause, based on the particular circumstances of that case, for the extension.

(l) The Department may delegate its authority for conducting complaint investigations to other Federal agencies and may contract with nongovernment investigators to perform the investigation, but the authority for making the final determination may not be delegated to another agency.

PART 17—NONDISCRIMINATION ON THE BASIS OF SEX IN EDUCATION PROGRAMS OR ACTIVITIES RECEIVING FEDERAL FINANCIAL ASSISTANCE

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SOURCE: 68 FR 10892, Mar. 6, 2003, unless otherwise noted.

Subpart A—Introduction

§ 17.100 Purpose and effective date.

(a) The purpose of these Title IX regulations is to effectuate Title IX of the Education Amendments of 1972, as amended (except sections 904 and 906 of those Amendments) (20 U.S.C. 1681, 1682, 1683, 1685, 1686, 1687, 1688), which is designed to eliminate (with certain exceptions) discrimination on the basis of

sex in any education program or activity receiving Federal financial assistance, whether or not such program or activity is offered or sponsored by an educational institution as defined in these Title IX regulations. The effective date of these Title IX regulations shall be March 6, 2003.

(b) The provisions established by this part shall be effective for all components of the Department, including all Department components that are transferred to the Department, except to the extent that a Department component already has existing Title IX regulations.

§ 17.105 Definitions.

As used in these Title IX regulations, the term:

(a) *Administratively separate unit* means a school, department, or college of an educational institution (other than a local educational agency) admission to which is independent of admission to any other component of such institution.

(b) *Admission* means selection for part-time, full-time, special, associate, transfer, exchange, or any other enrollment, membership, or matriculation in or at an education program or activity operated by a recipient.

(c) *Applicant* means one who submits an application, request, or plan required to be approved by an official of the Federal agency that awards Federal financial assistance, or by a recipient, as a condition to becoming a recipient.

(d) *Department* means Department of Homeland Security.

(e) *Designated agency official* means the Officer for Civil Rights and Civil Liberties, or the designee thereof.

(f) *Educational institution* means a local educational agency (LEA) as defined by 20 U.S.C. 8801(18), a preschool, a private elementary or secondary school, or an applicant or recipient that is an institution of graduate higher education, an institution of undergraduate higher education, an institution of professional education, or an institution of vocational education, as defined in this section.

(g) *Federal financial assistance* means any of the following, when authorized or extended under a law administered by the Federal agency that awards such assistance:

(1) A grant or loan of Federal financial assistance, including funds made available for:

(i) The acquisition, construction, renovation, restoration, or repair of a building or facility or any portion thereof; and

(ii) Scholarships, loans, grants, wages, or other funds extended to any entity for payment to or on behalf of students admitted to that entity, or extended directly to such students for payment to that entity.

(2) A grant of Federal real or personal property or any interest therein, including surplus property, and the proceeds of the sale or transfer of such property, if the Federal share of the fair market value of the property is not, upon such sale or transfer, properly accounted for to the Federal Government.

(3) Provision of the services of Federal personnel.

(4) Sale or lease of Federal property or any interest therein at nominal consideration, or at consideration reduced for the purpose of assisting the recipient or in recognition of public interest to be served thereby, or permission to use Federal property or any interest therein without consideration.

(5) Any other contract, agreement, or arrangement that has as one of its purposes the provision of assistance to any education program or activity, except a contract of insurance or guaranty.

(h) *Institution of graduate higher education* means an institution that:

(1) Offers academic study beyond the bachelor of arts or bachelor of science degree, whether or not leading to a certificate of any higher degree in the liberal arts and sciences;

(2) Awards any degree in a professional field beyond the first professional degree (regardless of whether the first professional degree in such field is awarded by an institution of undergraduate higher education or professional education); or

(3) Awards no degree and offers no further academic study, but operates ordinarily for the purpose of facilitating research by persons who have received the highest graduate degree in any field of study.

(i) *Institution of professional education* means an institution (except any institution of undergraduate higher education) that offers a program of academic study that leads to a first professional degree in a field for which there is a national specialized accrediting agency recognized by the Secretary of Education.

(j) *Institution of undergraduate higher education* means:

(1) An institution offering at least two but less than four years of college-level study beyond the high school level, leading to a diploma or an associate degree, or wholly or principally creditable toward a baccalaureate degree;

(2) An institution offering academic study leading to a baccalaureate degree; or

(3) An agency or body that certifies credentials or offers degrees, but that may or may not offer academic study.

(k) *Institution of vocational education* means a school or institution (except an institution of professional or graduate or undergraduate higher education) that has as its primary purpose preparation of students to pursue a technical, skilled, or semi-skilled occupation or trade, or to pursue study in a technical field, whether or not the school or institution offers certificates, diplomas, or degrees and whether or not it offers full-time study.

(l) *Recipient* means any State or political subdivision thereof or any instrumentality of a State or political subdivision thereof, any public or private agency, institution, or organization, or other entity, or any person, to whom Federal financial assistance is extended directly or through another recipient and that operates an education program or activity that receives such assistance, including any subunit, successor, assignee, or transferee thereof.

(m) *Reviewing authority* means that component of the Department delegated authority to review the decisions of hearing officers in cases arising under these Title IX regulations.

(n) *Secretary* means Secretary of the Department of Homeland Security.

(o) *Student* means a person who has gained admission.

(p) *Title IX* means Title IX of the Education Amendments of 1972, Public Law 92–318, 86 Stat. 235, 373 (codified as amended at 20 U.S.C. 1681–1688) (except sections 904 and 906 thereof), as amended by section 3 of Public Law 93–568, 88 Stat. 1855, by section 412 of the Education Amendments of 1976, Public Law 94–482, 90 Stat. 2234, and by section 3 of Public Law 100–259, 102 Stat. 28, 28–29 (20 U.S.C. 1681, 1682, 1683, 1685, 1686, 1687, 1688).

(q) *Title IX regulations* means the provisions of this part.

(r) *Transition plan* means a plan subject to the approval of the Secretary of Education pursuant to section 901(a)(2) of the Education Amendments of 1972 (20 U.S.C. 1681(a)(2)), under which an educational institution operates in making the transition from being an educational institution that admits only students of one sex to being one that admits students of both sexes without discrimination.

§ 17.110 Remedial and affirmative action and self-evaluation.

(a) *Remedial action*. If the designated agency official finds that a recipient has discriminated against persons on the basis of sex in an education program or activity, such recipient shall take such remedial action as the designated agency official deems necessary to overcome the effects of such discrimination.

(b) *Affirmative action*. In the absence of a finding of discrimination on the basis of sex in an education program or activity, a recipient may take affirmative action consistent with law to overcome the effects of conditions that resulted in limited participation therein by persons of a particular sex. Nothing in these Title IX regulations shall be interpreted to alter any affirmative action obligations that a recipient may have under Executive Order 11246, 3 CFR, 1964–1965 Comp., p. 339; as amended by Executive Order 11375, 3 CFR, 1966–1970 Comp., p. 684; as amended by Executive Order 11478, 3 CFR, 1966–1970 Comp., p. 803; as amended by Executive Order 12086, 3 CFR, 1978 Comp., p. 230; as amended by Executive Order 12107, 3 CFR, 1978 Comp., p. 264.

(c) *Self-evaluation*. Each recipient education institution shall, within one year of March 6, 2003:

(1) Evaluate, in terms of the requirements of these Title IX regulations, its current policies and practices and the effects thereof concerning admission of students, treatment of students, and employment of both academic and nonacademic personnel working in connection with the recipient's education program or activity;

(2) Modify any of these policies and practices that do not or may not meet the requirements of these Title IX regulations; and

(3) Take appropriate remedial steps to eliminate the effects of any discrimination that resulted or may have resulted from adherence to these policies and practices.

(d) *Availability of self-evaluation and related materials*. Recipients shall maintain on file for at least three years following completion of the evaluation required under paragraph (c) of this section, and shall provide to the designated agency official upon request, a description of any modifications made pursuant to paragraph (c)(2) of this section and of any remedial steps taken pursuant to paragraph (c)(3) of this section.

§ 17.115 Assurance required.

(a) *General*. Either at the application stage or the award stage, Federal agencies must ensure that applications for Federal financial assistance or awards of Federal financial assistance contain, be accompanied by, or be covered by a specifically identified assurance from the applicant or recipient, satisfactory to the designated agency official, that each education program or activity operated by the applicant or recipient and to which these Title IX regulations apply will be operated in compliance with these Title IX regulations. An assurance of compliance with these Title IX regulations shall not be satisfactory to the designated agency official if the applicant or recipient to whom such assurance applies fails to commit itself to take whatever remedial action is necessary in accordance with § 17.110(a) to eliminate existing discrimination on the basis of sex or to eliminate the effects of past discrimination whether occurring prior to or subsequent to the submission to the designated agency official of such assurance.

(b) *Duration of obligation*. (1) In the case of Federal financial assistance extended to provide real property or structures thereon, such assurance shall obligate the recipient or, in the case of a subsequent transfer, the transferee, for the period during which the real property or structures are used to provide an education program or activity.

(2) In the case of Federal financial assistance extended to provide personal property, such assurance shall obligate the recipient for the period during which it retains ownership or possession of the property.

(3) In all other cases such assurance shall obligate the recipient for the period during which Federal financial assistance is extended.

(c) *Form*. (1) The assurances required by paragraph (a) of this section, which may be included as part of a document that addresses other assurances or obligations, shall include that the applicant or recipient will comply with all applicable Federal statutes relating to nondiscrimination. These include but are not limited to: Title IX of the Education Amendments of 1972, as amended (20 U.S.C. 1681–1683, 1685–1688).

(2) The designated agency official will specify the extent to which such assurances will be required of the applicant's or recipient's subgrantees, contractors, subcontractors, transferees, or successors in interest.

§ 17.120 Transfers of property.

If a recipient sells or otherwise transfers property financed in whole or in part with Federal financial assistance to a transferee that operates any education program or activity, and the Federal share of the fair market value of the property is not upon such sale or transfer properly accounted for to the Federal Government, both the transferor and the transferee shall be deemed to be recipients, subject to the provisions of §§ 17.205 through 17.235(a).

§ 17.125 Effect of other requirements.

(a) *Effect of other Federal provisions*. The obligations imposed by these Title IX regulations are independent of, and

do not alter, obligations not to discriminate on the basis of sex imposed by Executive Order 11246, 3 CFR, 1964–1965 Comp., p. 339; as amended by Executive Order 11375, 3 CFR, 1966–1970 Comp., p. 684; as amended by Executive Order 11478, 3 CFR, 1966–1970 Comp., p. 803; as amended by Executive Order 12087, 3 CFR, 1978 Comp., p. 230; as amended by Executive Order 12107, 3 CFR, 1978 Comp., p. 264; sections 704 and 855 of the Public Health Service Act (42 U.S.C. 295m, 298b–2); Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e *et seq.*); the Equal Pay Act of 1963 (29 U.S.C. 206); and any other Act of Congress or Federal regulation.

(b) *Effect of State or local law or other requirements.* The obligation to comply with these Title IX regulations is not obviated or alleviated by any State or local law or other requirement that would render any applicant or student ineligible, or limit the eligibility of any applicant or student, on the basis of sex, to practice any occupation or profession.

(c) *Effect of rules or regulations of private organizations.* The obligation to comply with these Title IX regulations is not obviated or alleviated by any rule or regulation of any organization, club, athletic or other league, or association that would render any applicant or student ineligible to participate or limit the eligibility or participation of any applicant or student, on the basis of sex, in any education program or activity operated by a recipient and that receives Federal financial assistance.

§ 17.130 Effect of employment opportunities.

The obligation to comply with these Title IX regulations is not obviated or alleviated because employment opportunities in any occupation or profession are or may be more limited for members of one sex than for members of the other sex.

§ 17.135 Designation of responsible employee and adoption of grievance procedures.

(a) *Designation of responsible employee.* Each recipient shall designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under these Title IX regulations, including any investigation of any complaint communicated to such recipient alleging its noncompliance with these Title IX regulations or alleging any actions that would be prohibited by these Title IX regulations. The recipient shall notify all its students and employees of the name, office address, and telephone number of the employee or employees appointed pursuant to this paragraph.

(b) *Complaint procedure of recipient.* A recipient shall adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints alleging any action that would be prohibited by these Title IX regulations.

§ 17.140 Dissemination of policy.

(a) *Notification of policy.* (1) Each recipient shall implement specific and continuing steps to notify applicants for admission and employment, students and parents of elementary and secondary school students, employees, sources of referral of applicants for admission and employment, and all unions or professional organizations holding collective bargaining or professional agreements with the recipient, that it does not discriminate on the basis of sex in the educational programs or activities that it operates, and that it is required by Title IX and these Title IX regulations not to discriminate in such a manner. Such notification shall contain such information, and be made in such manner, as the designated agency official finds necessary to apprise such persons of the protections against discrimination assured them by Title IX and these Title IX regulations, but shall state at least that the requirement not to discriminate in education programs or activities extends to employment therein, and to admission thereto unless §§ 17.300 through 17.310 do not apply to the recipient, and that inquiries concerning the application of Title IX and these Title IX regulations to such recipient may be referred to the employee designated pursuant to § 17.135, or to the designated agency official.

(2) Each recipient shall make the initial notification required by paragraph (a)(1) of this section within 90 days of

March 6, 2003 or of the date these Title IX regulations first apply to such recipient, whichever comes later, which notification shall include publication in:

(i) Newspapers and magazines operated by such recipient or by student, alumnae, or alumni groups for or in connection with such recipient; and

(ii) Memoranda or other written communications distributed to every student and employee of such recipient.

(b) *Publications.* (1) Each recipient shall prominently include a statement of the policy described in paragraph (a) of this section in each announcement, bulletin, catalog, or application form that it makes available to any person of a type, described in paragraph (a) of this section, or which is otherwise used in connection with the recruitment of students or employees.

(2) A recipient shall not use or distribute a publication of the type described in paragraph (b)(1) of this section that suggests, by text or illustration, that such recipient treats applicants, students, or employees differently on the basis of sex except as such treatment is permitted by these Title IX regulations.

(c) *Distribution.* Each recipient shall distribute without discrimination on the basis of sex each publication described in paragraph (b)(1) of this section, and shall apprise each of its admission and employment recruitment representatives of the policy of nondiscrimination described in paragraph (a) of this section, and shall require such representatives to adhere to such policy.

Subpart B—Coverage

§ 17.200 Application.

Except as provided in §§ 17.205 through 17.235(a), these Title IX regulations apply to every recipient and to each education program or activity operated by such recipient that receives Federal financial assistance.

§ 17.205 Educational institutions and other entities controlled by religious organizations.

(a) *Exemption.* These Title IX regulations do not apply to any operation of an educational institution or other entity that is controlled by a religious organization to the extent that application of these Title IX regulations would not be consistent with the religious tenets of such organization.

(b) *Exemption claims.* An educational institution or other entity that wishes to claim the exemption set forth in paragraph (a) of this section shall do so by submitting in writing to the designated agency official a statement by the highest-ranking official of the institution, identifying the provisions of these Title IX regulations that conflict with a specific tenet of the religious organization.

§ 17.210 Military and merchant marine educational institutions.

These Title IX regulations do not apply to an educational institution whose primary purpose is the training of individuals for a military service of the United States or for the merchant marine.

§ 17.215 Membership practices of certain organizations.

(a) *Social fraternities and sororities.* These Title IX regulations do not apply to the membership practices of social fraternities and sororities that are exempt from taxation under section 501(a) of the Internal Revenue Code of 1954, 26 U.S.C. 501(a), the active membership of which consists primarily of students in attendance at institutions of higher education.

(b) *YMCA, YWCA, Girl Scouts, Boy Scouts, and Camp Fire Girls.* These Title IX regulations do not apply to the membership practices of the Young Men's Christian Association (YMCA), the Young Women's Christian Association (YWCA), the Girl Scouts, the Boy Scouts, and Camp Fire Girls.

(c) *Voluntary youth service organizations.* These Title IX regulations do not apply to the membership practices of a voluntary youth service organization that is exempt from taxation under section 501(a) of the Internal Revenue Code of 1986 (26 U.S.C. 501(a)), and the membership of which has been traditionally limited to members of one sex and principally to persons of less than nineteen years of age.

§ 17.220 Admissions.

(a) *General.* Admissions to educational institutions prior to June 24, 1973, are not covered by these Title IX regulations.

(b) *Administratively separate units.* For the purposes only of this section, §§ 17.225, 17.230, and 17.300 through 17.310, each administratively separate unit shall be deemed to be an educational institution.

(c) *Application of §§ 17.300 through 17.310.* Except as provided in paragraphs (d) and (e) of this section, §§ 17.300 through 17.310 apply to each recipient. A recipient to which §§ 17.300 through 17.310 apply shall not discriminate on the basis of sex in admission or recruitment in violation of §§ 17.300 through 17.310.

(d) *Educational institutions.* Except as provided in paragraph (e) of this section as to recipients that are educational institutions, §§ 17.300 through 17.310 apply only to institutions of vocational education, professional education, graduate higher education, and public institutions of undergraduate higher education.

(e) *Public institutions of undergraduate higher education.* Sections 17.300 through 17.310 do not apply to any public institution of undergraduate higher education that traditionally and continually from its establishment has had a policy of admitting students of only one sex.

§ 17.225 Educational institutions eligible to submit transition plans.

(a) *Application.* This section applies to each educational institution to which §§ 17.300 through 17.310 apply that:

(1) Admitted students of only one sex as regular students as of June 23, 1972; or

(2) Admitted students of only one sex as regular students as of June 23, 1965, but thereafter admitted, as regular students, students of the sex not admitted prior to June 23, 1965.

(b) Provision for transition plans. An educational institution to which this section applies shall not discriminate on the basis of sex in admission or recruitment in violation of §§ 17.300 through 17.310.

§ 17.230 Transition plans.

(a) *Submission of plans.* An institution to which § 17.225 applies and that is composed of more than one administratively separate unit may submit either a single transition plan applicable to all such units, or a separate transition plan applicable to each such unit.

(b) *Content of plans.* In order to be approved by the Secretary of Education, a transition plan shall:

(1) State the name, address, and Federal Interagency Committee on Education Code of the educational institution submitting such plan, the administratively separate units to which the plan is applicable, and the name, address, and telephone number of the person to whom questions concerning the plan may be addressed. The person who submits the plan shall be the chief administrator or president of the institution, or another individual legally authorized to bind the institution to all actions set forth in the plan.

(2) State whether the educational institution or administratively separate unit admits students of both sexes as regular students and, if so, when it began to do so.

(3) Identify and describe with respect to the educational institution or administratively separate unit any obstacles to admitting students without discrimination on the basis of sex.

(4) Describe in detail the steps necessary to eliminate as soon as practicable each obstacle so identified and indicate the schedule for taking these steps and the individual directly responsible for their implementation.

(5) Include estimates of the number of students, by sex, expected to apply for, be admitted to, and enter each class during the period covered by the plan.

(c) *Nondiscrimination.* No policy or practice of a recipient to which § 17.225 applies shall result in treatment of applicants to or students of such recipient in violation of §§ 17.300 through 17.310 unless such treatment is necessitated by an obstacle identified in paragraph (b)(3) of this section and a schedule for eliminating that obstacle has been provided as required by paragraph (b)(4) of this section.

(d) *Effects of past exclusion.* To overcome the effects of past exclusion of

students on the basis of sex, each educational institution to which § 17.225 applies shall include in its transition plan, and shall implement, specific steps designed to encourage individuals of the previously excluded sex to apply for admission to such institution. Such steps shall include instituting recruitment programs that emphasize the institution's commitment to enrolling students of the sex previously excluded.

§ 17.235 Statutory amendments.

(a) This section, which applies to all provisions of these Title IX regulations, addresses statutory amendments to Title IX.

(b) These Title IX regulations shall not apply to or preclude:

(1) Any program or activity of the American Legion undertaken in connection with the organization or operation of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference;

(2) Any program or activity of a secondary school or educational institution specifically for:

(i) The promotion of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference; or

(ii) The selection of students to attend any such conference;

(3) Father-son or mother-daughter activities at an educational institution or in an education program or activity, but if such activities are provided for students of one sex, opportunities for reasonably comparable activities shall be provided to students of the other sex;

(4) Any scholarship or other financial assistance awarded by an institution of higher education to an individual because such individual has received such award in a single-sex pageant based upon a combination of factors related to the individual's personal appearance, poise, and talent. The pageant, however, must comply with other nondiscrimination provisions of Federal law.

(c) For purposes of these Title IX regulations, program or activity or program means:

(1) All of the operations of any entity described in paragraphs (c)(1)(i) through (iv) of this section, any part of which is extended Federal financial assistance:

(i)(A) A department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(B) The entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(ii)(A) A college, university, or other postsecondary institution, or a public system of higher education; or

(B) A local educational agency (as defined in 20 U.S.C. 8801), system of vocational education, or other school system;

(iii)(A) An entire corporation, partnership, or other private organization, or an entire sole proprietorship:

(*1*) If assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(*2*) Which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(B) The entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(iv) Any other entity that is established by two or more of the entities described in paragraphs (c)(1)(i), (ii), or (iii) of this section.

(2)(i) Program or activity does not include any operation of an entity that is controlled by a religious organization if the application of 20 U.S.C. 1681 to such operation would not be consistent with the religious tenets of such organization.

(ii) For example, all of the operations of a college, university, or other postsecondary institution, including but not limited to traditional educational operations, faculty and student housing, campus shuttle bus service, campus restaurants, the bookstore, and other commercial activities are part of a program or activity subject to these

Title IX regulations if the college, university, or other institution receives Federal financial assistance.

(d)(1) Nothing in these Title IX regulations shall be construed to require or prohibit any person, or public or private entity, to provide or pay for any benefit or service, including the use of facilities, related to an abortion. Medical procedures, benefits, services, and the use of facilities, necessary to save the life of a pregnant woman or to address complications related to an abortion are not subject to this section.

(2) Nothing in this section shall be construed to permit a penalty to be imposed on any person or individual because such person or individual is seeking or has received any benefit or service related to a legal abortion. Accordingly, subject to paragraph (d)(1) of this section, no person shall be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any academic, extracurricular, research, occupational training, employment, or other educational program or activity operated by a recipient that receives Federal financial assistance because such individual has sought or received, or is seeking, a legal abortion, or any benefit or service related to a legal abortion.

Subpart C—Discrimination on the Basis of Sex in Admission and Recruitment Prohibited

§ 17.300 Admission.

(a) *General.* No person shall, on the basis of sex, be denied admission, or be subjected to discrimination in admission, by any recipient to which §§ 17.300 through 17.310 apply, except as provided in §§ 17.225 and 17.230.

(b) *Specific prohibitions.* (1) In determining whether a person satisfies any policy or criterion for admission, or in making any offer of admission, a recipient to which §§ 17.300 through 17.310 apply shall not:

(i) Give preference to one person over another on the basis of sex, by ranking applicants separately on such basis, or otherwise;

(ii) Apply numerical limitations upon the number or proportion of persons of either sex who may be admitted; or

(iii) Otherwise treat one individual differently from another on the basis of sex.

(2) A recipient shall not administer or operate any test or other criterion for admission that has a disproportionately adverse effect on persons on the basis of sex unless the use of such test or criterion is shown to predict validly success in the education program or activity in question and alternative tests or criteria that do not have such a disproportionately adverse effect are shown to be unavailable.

(c) *Prohibitions relating to marital or parental status.* In determining whether a person satisfies any policy or criterion for admission, or in making any offer of admission, a recipient to which §§ 17.300 through 17.310 apply:

(1) Shall not apply any rule concerning the actual or potential parental, family, or marital status of a student or applicant that treats persons differently on the basis of sex;

(2) Shall not discriminate against or exclude any person on the basis of pregnancy, childbirth, termination of pregnancy, or recovery therefrom, or establish or follow any rule or practice that so discriminates or excludes;

(3) Subject to § 17.235(d), shall treat disabilities related to pregnancy, childbirth, termination of pregnancy, or recovery therefrom in the same manner and under the same policies as any other temporary disability or physical condition; and

(4) Shall not make pre-admission inquiry as to the marital status of an applicant for admission, including whether such applicant is ''Miss'' or ''Mrs.'' A recipient may make pre-admission inquiry as to the sex of an applicant for admission, but only if such inquiry is made equally of such applicants of both sexes and if the results of such inquiry are not used in connection with discrimination prohibited by these Title IX regulations.

§ 17.305 Preference in admission.

A recipient to which §§ 17.300 through 17.310 apply shall not give preference to applicants for admission, on the basis of attendance at any educational institution or other school or entity that

admits as students only or predominantly members of one sex, if the giving of such preference has the effect of discriminating on the basis of sex in violation of §§ 17.300 through 17.310.

§ 17.310 Recruitment.

(a) *Nondiscriminatory recruitment.* A recipient to which §§ 17.300 through 17.310 apply shall not discriminate on the basis of sex in the recruitment and admission of students. A recipient may be required to undertake additional recruitment efforts for one sex as remedial action pursuant to § 17.110(a), and may choose to undertake such efforts as affirmative action pursuant to § 17.110(b).

(b) *Recruitment at certain institutions.* A recipient to which §§ 17.300 through 17.310 apply shall not recruit primarily or exclusively at educational institutions, schools, or entities that admit as students only or predominantly members of one sex, if such actions have the effect of discriminating on the basis of sex in violation of §§ 17.300 through 17.310.

Subpart D—Discrimination on the Basis of Sex in Education Programs or Activities Prohibited

§ 17.400 Education programs or activities.

(a) *General.* Except as provided elsewhere in these Title IX regulations, no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any academic, extracurricular, research, occupational training, or other education program or activity operated by a recipient that receives Federal financial assistance. Sections 17.400 through 17.455 do not apply to actions of a recipient in connection with admission of its students to an education program or activity of a recipient to which §§ 17.300 through 17.310 do not apply, or an entity, not a recipient, to which §§ 17.300 through 17.310 would not apply if the entity were a recipient.

(b) *Specific prohibitions.* Except as provided in §§ 17.400 through 17.455, in providing any aid, benefit, or service to a student, a recipient shall not, on the basis of sex:

(1) Treat one person differently from another in determining whether such person satisfies any requirement or condition for the provision of such aid, benefit, or service;

(2) Provide different aid, benefits, or services or provide aid, benefits, or services in a different manner;

(3) Deny any person any such aid, benefit, or service;

(4) Subject any person to separate or different rules of behavior, sanctions, or other treatment;

(5) Apply any rule concerning the domicile or residence of a student or applicant, including eligibility for in-state fees and tuition;

(6) Aid or perpetuate discrimination against any person by providing significant assistance to any agency, organization, or person that discriminates on the basis of sex in providing any aid, benefit, or service to students or employees; or

(7) Otherwise limit any person in the enjoyment of any right, privilege, advantage, or opportunity.

(c) *Assistance administered by a recipient educational institution to study at a foreign institution.* A recipient educational institution may administer or assist in the administration of scholarships, fellowships, or other awards established by foreign or domestic wills, trusts, or similar legal instruments, or by acts of foreign governments and restricted to members of one sex, that are designed to provide opportunities to study abroad, and that are awarded to students who are already matriculating at or who are graduates of the recipient institution; Provided, that a recipient educational institution that administers or assists in the administration of such scholarships, fellowships, or other awards that are restricted to members of one sex provides, or otherwise makes available, reasonable opportunities for similar studies for members of the other sex. Such opportunities may be derived from either domestic or foreign sources.

(d) *Aids, benefits or services not provided by recipient.* (1) This paragraph (d) applies to any recipient that requires participation by any applicant, student, or employee in any education

program or activity not operated wholly by such recipient, or that facilitates, permits, or considers such participation as part of or equivalent to an education program or activity operated by such recipient, including participation in educational consortia and cooperative employment and student-teaching assignments.

(2) Such recipient:

(i) Shall develop and implement a procedure designed to assure itself that the operator or sponsor of such other education program or activity takes no action affecting any applicant, student, or employee of such recipient that these Title IX regulations would prohibit such recipient from taking; and

(ii) Shall not facilitate, require, permit, or consider such participation if such action occurs.

§ 17.405 Housing.

(a) *General.* A recipient shall not, on the basis of sex, apply different rules or regulations, impose different fees or requirements, or offer different services or benefits related to housing, except as provided in this section (including housing provided only to married students).

(b) *Housing provided by recipient.* (1) A recipient may provide separate housing on the basis of sex.

(2) Housing provided by a recipient to students of one sex, when compared to that provided to students of the other sex, shall be as a whole:

(i) Proportionate in quantity to the number of students of that sex applying for such housing; and

(ii) Comparable in quality and cost to the student.

(c) *Other housing.* (1) A recipient shall not, on the basis of sex, administer different policies or practices concerning occupancy by its students of housing other than that provided by such recipient.

(2)(i) A recipient which, through solicitation, listing, approval of housing, or otherwise, assists any agency, organization, or person in making housing available to any of its students, shall take such reasonable action as may be necessary to assure itself that such housing as is provided to students of one sex, when compared to that provided to students of the other sex, is as a whole:

(A) Proportionate in quantity; and

(B) Comparable in quality and cost to the student.

(ii) A recipient may render such assistance to any agency, organization, or person that provides all or part of such housing to students of only one sex.

§ 17.410 Comparable facilities.

A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex.

§ 17.415 Access to course offerings.

(a) A recipient shall not provide any course or otherwise carry out any of its education program or activity separately on the basis of sex, or require or refuse participation therein by any of its students on such basis, including health, physical education, industrial, business, vocational, technical, home economics, music, and adult education courses.

(b)(1) With respect to physical education classes and activities at the elementary school level, the recipient shall comply fully with this section as expeditiously as possible, but in no event later than one year from March 6, 2003. With respect to physical education classes and activities at the secondary and post-secondary levels, the recipient shall comply fully with this section as expeditiously as possible but in no event later than three years from March 6, 2003.

(2) This section does not prohibit grouping of students in physical education classes and activities by ability as assessed by objective standards of individual performance developed and applied without regard to sex.

(3) This section does not prohibit separation of students by sex within physical education classes or activities during participation in wrestling, boxing, rugby, ice hockey, football, basketball, and other sports the purpose or major activity of which involves bodily contact.

(4) Where use of a single standard of measuring skill or progress in a physical education class has an adverse effect on members of one sex, the recipient shall use appropriate standards that do not have such effect.

(5) Portions of classes in elementary and secondary schools, or portions of education programs or activities, that deal exclusively with human sexuality may be conducted in separate sessions for boys and girls.

(6) Recipients may make requirements based on vocal range or quality that may result in a chorus or choruses of one or predominantly one sex.

§ 17.420 Access to schools operated by LEAs.

A recipient that is a local educational agency shall not, on the basis of sex, exclude any person from admission to:

(a) Any institution of vocational education operated by such recipient; or

(b) Any other school or educational unit operated by such recipient, unless such recipient otherwise makes available to such person, pursuant to the same policies and criteria of admission, courses, services, and facilities comparable to each course, service, and facility offered in or through such schools.

§ 17.425 Counseling and use of appraisal and counseling materials.

(a) *Counseling.* A recipient shall not discriminate against any person on the basis of sex in the counseling or guidance of students or applicants for admission.

(b) *Use of appraisal and counseling materials.* A recipient that uses testing or other materials for appraising or counseling students shall not use different materials for students on the basis of their sex or use materials that permit or require different treatment of students on such basis unless such different materials cover the same occupations and interest areas and the use of such different materials is shown to be essential to eliminate sex bias. Recipients shall develop and use internal procedures for ensuring that such materials do not discriminate on the basis of sex. Where the use of a counseling test or other instrument results in a substantially disproportionate number of members of one sex in any particular course of study or classification, the recipient shall take such action as is necessary to assure itself that such disproportion is not the result of discrimination in the instrument or its application.

(c) *Disproportion in classes.* Where a recipient finds that a particular class contains a substantially disproportionate number of individuals of one sex, the recipient shall take such action as is necessary to assure itself that such disproportion is not the result of discrimination on the basis of sex in counseling or appraisal materials or by counselors.

§ 17.430 Financial assistance.

(a) *General.* Except as provided in paragraphs (b) and (c) of this section, in providing financial assistance to any of its students, a recipient shall not:

(1) On the basis of sex, provide different amounts or types of such assistance, limit eligibility for such assistance that is of any particular type or source, apply different criteria, or otherwise discriminate;

(2) Through solicitation, listing, approval, provision of facilities, or other services, assist any foundation, trust, agency, organization, or person that provides assistance to any of such recipient's students in a manner that discriminates on the basis of sex; or

(3) Apply any rule or assist in application of any rule concerning eligibility for such assistance that treats persons of one sex differently from persons of the other sex with regard to marital or parental status.

(b) *Financial aid established by certain legal instruments.* (1) A recipient may administer or assist in the administration of scholarships, fellowships, or other forms of financial assistance established pursuant to domestic or foreign wills, trusts, bequests, or similar legal instruments or by acts of a foreign government that require that awards be made to members of a particular sex specified therein; Provided, that the overall effect of the award of such sex-restricted scholarships, fellowships, and other forms of financial assistance does not discriminate on the basis of sex.

(2) To ensure nondiscriminatory awards of assistance as required in paragraph (b)(1) of this section, recipients shall develop and use procedures under which:

(i) Students are selected for award of financial assistance on the basis of nondiscriminatory criteria and not on the basis of availability of funds restricted to members of a particular sex.

(ii) An appropriate sex-restricted scholarship, fellowship, or other form of financial assistance is allocated to each student selected under paragraph (b)(2)(i) of this section; and

(iii) No student is denied the award for which he or she was selected under paragraph (b)(2)(i) of this section because of the absence of a scholarship, fellowship, or other form of financial assistance designated for a member of that student's sex.

(c) *Athletic scholarships.* (1) To the extent that a recipient awards athletic scholarships or grants-in-aid, it must provide reasonable opportunities for such awards for members of each sex in proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics.

(2) A recipient may provide separate athletic scholarships or grants-in-aid for members of each sex as part of separate athletic teams for members of each sex to the extent consistent with this paragraph (c) and § 17.450.

§ 17.435 Employment assistance to students.

(a) *Assistance by recipient in making available outside employment.* A recipient that assists any agency, organization, or person in making employment available to any of its students:

(1) Shall assure itself that such employment is made available without discrimination on the basis of sex; and

(2) Shall not render such services to any agency, organization, or person that discriminates on the basis of sex in its employment practices.

(b) *Employment of students by recipients.* A recipient that employs any of its students shall not do so in a manner that violates §§ 17.500 through 17.550.

§ 17.440 Health and insurance benefits and services.

Subject to § 17.235(d), in providing a medical, hospital, accident, or life insurance benefit, service, policy, or plan to any of its students, a recipient shall not discriminate on the basis of sex, or provide such benefit, service, policy, or plan in a manner that would violate §§ 17.500 through 17.550 if it were provided to employees of the recipient. This section shall not prohibit a recipient from providing any benefit or service that may be used by a different proportion of students of one sex than of the other, including family planning services. However, any recipient that provides full coverage health service shall provide gynecological care.

§ 17.445 Marital or parental status.

(a) *Status generally.* A recipient shall not apply any rule concerning a student's actual or potential parental, family, or marital status that treats students differently on the basis of sex.

(b) *Pregnancy and related conditions.* (1) A recipient shall not discriminate against any student, or exclude any student from its education program or activity, including any class or extracurricular activity, on the basis of such student's pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery therefrom, unless the student requests voluntarily to participate in a separate portion of the program or activity of the recipient.

(2) A recipient may require such a student to obtain the certification of a physician that the student is physically and emotionally able to continue participation as long as such a certification is required of all students for other physical or emotional conditions requiring the attention of a physician.

(3) A recipient that operates a portion of its education program or activity separately for pregnant students, admittance to which is completely voluntary on the part of the student as provided in paragraph (b)(1) of this section, shall ensure that the separate portion is comparable to that offered to non-pregnant students.

(4) Subject to § 17.235(d), a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom in the same

manner and under the same policies as any other temporary disability with respect to any medical or hospital benefit, service, plan, or policy that such recipient administers, operates, offers, or participates in with respect to students admitted to the recipient's educational program or activity.

(5) In the case of a recipient that does not maintain a leave policy for its students, or in the case of a student who does not otherwise qualify for leave under such a policy, a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy, and recovery therefrom as a justification for a leave of absence for as long a period of time as is deemed medically necessary by the student's physician, at the conclusion of which the student shall be reinstated to the status that she held when the leave began.

§ 17.450 Athletics.

(a) *General*. No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person, or otherwise be discriminated against in any interscholastic, intercollegiate, club, or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.

(b) *Separate teams*. Notwithstanding the requirements of paragraph (a) of this section, a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try out for the team offered unless the sport involved is a contact sport. For the purposes of these Title IX regulations, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball, and other sports the purpose or major activity of which involves bodily contact.

(c) *Equal opportunity*. (1) A recipient that operates or sponsors interscholastic, intercollegiate, club, or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available, the designated agency official will consider, among other factors:

(i) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;

(ii) The provision of equipment and supplies;

(iii) Scheduling of games and practice time;

(iv) Travel and per diem allowance;

(v) Opportunity to receive coaching and academic tutoring;

(vi) Assignment and compensation of coaches and tutors;

(vii) Provision of locker rooms, practice, and competitive facilities;

(viii) Provision of medical and training facilities and services;

(ix) Provision of housing and dining facilities and services; and

(x) Publicity.

(2) For purposes of paragraph (c)(1) of this section, unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams if a recipient operates or sponsors separate teams will not constitute noncompliance with this section, but the designated agency official may consider the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for members of each sex.

(d) *Adjustment period*. A recipient that operates or sponsors interscholastic, intercollegiate, club, or intramural athletics at the elementary school level shall comply fully with this section as expeditiously as possible but in no event later than one year from March 6, 2003. A recipient that operates or sponsors interscholastic, intercollegiate, club, or intramural athletics at the secondary or postsecondary school level shall comply fully with this section as expeditiously as possible but in no event later than three years from March 6, 2003.

§ 17.455 Textbooks and curricular material.

Nothing in these Title IX regulations shall be interpreted as requiring or prohibiting or abridging in any way the use of particular textbooks or curricular materials.

Subpart E—Discrimination on the Basis of Sex in Employment in Education Programs or Activities Prohibited

§ 17.500 Employment.

(a) *General.* (1) No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination in employment, or recruitment, consideration, or selection therefore, whether full-time or part-time, under any education program or activity operated by a recipient that receives Federal financial assistance.

(2) A recipient shall make all employment decisions in any education program or activity operated by such recipient in a nondiscriminatory manner and shall not limit, segregate, or classify applicants or employees in any way that could adversely affect any applicant's or employee's employment opportunities or status because of sex.

(3) A recipient shall not enter into any contractual or other relationship which directly or indirectly has the effect of subjecting employees or students to discrimination prohibited by §§ 17.500 through 17.550, including relationships with employment and referral agencies, with labor unions, and with organizations providing or administering fringe benefits to employees of the recipient.

(4) A recipient shall not grant preferences to applicants for employment on the basis of attendance at any educational institution or entity that admits as students only or predominantly members of one sex, if the giving of such preferences has the effect of discriminating on the basis of sex in violation of these Title IX regulations.

(b) *Application.* Sections 17.500 through 17.550 apply to:

(1) Recruitment, advertising, and the process of application for employment;

(2) Hiring, upgrading, promotion, consideration for and award of tenure, demotion, transfer, layoff, termination, application of nepotism policies, right of return from layoff, and rehiring;

(3) Rates of pay or any other form of compensation, and changes in compensation;

(4) Job assignments, classifications, and structure, including position descriptions, lines of progression, and seniority lists;

(5) The terms of any collective bargaining agreement;

(6) Granting and return from leaves of absence, leave for pregnancy, childbirth, false pregnancy, termination of pregnancy, leave for persons of either sex to care for children or dependents, or any other leave;

(7) Fringe benefits available by virtue of employment, whether or not administered by the recipient;

(8) Selection and financial support for training, including apprenticeship, professional meetings, conferences, and other related activities, selection for tuition assistance, selection for sabbaticals and leaves of absence to pursue training;

(9) Employer-sponsored activities, including social or recreational programs; and

(10) Any other term, condition, or privilege of employment.

§ 17.505 Employment criteria.

A recipient shall not administer or operate any test or other criterion for any employment opportunity that has a disproportionately adverse effect on persons on the basis of sex unless:

(a) Use of such test or other criterion is shown to predict validly successful performance in the position in question; and

(b) Alternative tests or criteria for such purpose, which do not have such disproportionately adverse effect, are shown to be unavailable.

§ 17.510 Recruitment.

(a) *Nondiscriminatory recruitment and hiring.* A recipient shall not discriminate on the basis of sex in the recruitment and hiring of employees. Where a recipient has been found to be presently discriminating on the basis of sex

in the recruitment or hiring of employees, or has been found to have so discriminated in the past, the recipient shall recruit members of the sex so discriminated against so as to overcome the effects of such past or present discrimination.

(b) *Recruitment patterns.* A recipient shall not recruit primarily or exclusively at entities that furnish as applicants only or predominantly members of one sex if such actions have the effect of discriminating on the basis of sex in violation of §§ 17.500 through 17.550.

§ 17.515 Compensation.

A recipient shall not make or enforce any policy or practice that, on the basis of sex:

(a) Makes distinctions in rates of pay or other compensation;

(b) Results in the payment of wages to employees of one sex at a rate less than that paid to employees of the opposite sex for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and that are performed under similar working conditions.

§ 17.520 Job classification and structure.

A recipient shall not:

(a) Classify a job as being for males or for females;

(b) Maintain or establish separate lines of progression, seniority lists, career ladders, or tenure systems based on sex; or

(c) Maintain or establish separate lines of progression, seniority systems, career ladders, or tenure systems for similar jobs, position descriptions, or job requirements that classify persons on the basis of sex, unless sex is a bona fide occupational qualification for the positions in question as set forth in § 17.550.

§ 17.525 Fringe benefits.

(a) *''Fringe benefits'' defined.* For purposes of these Title IX regulations, the term fringe benefits means any medical, hospital, accident, life insurance, or retirement benefit, service, policy or plan, any profit-sharing or bonus plan, leave, and any other benefit or service of employment not subject to the provisions of § 17.515.

(b) *Prohibitions.* A recipient shall not:

(1) Discriminate on the basis of sex with regard to making fringe benefits available to employees or make fringe benefits available to spouses, families, or dependents of employees differently upon the basis of the employee's sex;

(2) Administer, operate, offer, or participate in a fringe benefit plan that does not provide for equal periodic benefits for members of each sex and for equal contributions to the plan by such recipient for members of each sex; or

(3) Administer, operate, offer, or participate in a pension or retirement plan that establishes different optional or compulsory retirement ages based on sex or that otherwise discriminates in benefits on the basis of sex.

§ 17.530 Marital or parental status.

(a) *General.* A recipient shall not apply any policy or take any employment action:

(1) Concerning the potential marital, parental, or family status of an employee or applicant for employment that treats persons differently on the basis of sex; or

(2) Which is based upon whether an employee or applicant for employment is the head of household or principal wage earner in such employee's or applicant's family unit.

(b) *Pregnancy.* A recipient shall not discriminate against or exclude from employment any employee or applicant for employment on the basis of pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery therefrom.

(c) *Pregnancy as a temporary disability.* Subject to § 17.235(d), a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy, recovery therefrom, and any temporary disability resulting therefrom as any other temporary disability for all job-related purposes, including commencement, duration, and extensions of leave, payment of disability income, accrual of seniority and any other benefit or service, and reinstatement, and under any fringe benefit offered to employees by virtue of employment.

(d) *Pregnancy leave.* In the case of a recipient that does not maintain a

leave policy for its employees, or in the case of an employee with insufficient leave or accrued employment time to qualify for leave under such a policy, a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy, and recovery therefrom as a justification for a leave of absence without pay for a reasonable period of time, at the conclusion of which the employee shall be reinstated to the status that she held when the leave began or to a comparable position, without decrease in rate of compensation or loss of promotional opportunities, or any other right or privilege of employment.

§ 17.535 Effect of state or local law or other requirements.

(a) *Prohibitory requirements.* The obligation to comply with §§ 17.500 through 17.550 is not obviated or alleviated by the existence of any State or local law or other requirement that imposes prohibitions or limits upon employment of members of one sex that are not imposed upon members of the other sex.

(b) *Benefits.* A recipient that provides any compensation, service, or benefit to members of one sex pursuant to a State or local law or other requirement shall provide the same compensation, service, or benefit to members of the other sex.

§ 17.540 Advertising.

A recipient shall not in any advertising related to employment indicate preference, limitation, specification, or discrimination based on sex unless sex is a bona fide occupational qualification for the particular job in question.

§ 17.545 Pre-employment inquiries.

(a) *Marital status.* A recipient shall not make pre-employment inquiry as to the marital status of an applicant for employment, including whether such applicant is ''Miss'' or ''Mrs.''

(b) *Sex.* A recipient may make pre-employment inquiry as to the sex of an applicant for employment, but only if such inquiry is made equally of such applicants of both sexes and if the results of such inquiry are not used in connection with discrimination prohibited by these Title IX regulations.

§ 17.550 Sex as a bona fide occupational qualification.

A recipient may take action otherwise prohibited by §§ 17.500 through 17.550 provided it is shown that sex is a bona fide occupational qualification for that action, such that consideration of sex with regard to such action is essential to successful operation of the employment function concerned. A recipient shall not take action pursuant to this section that is based upon alleged comparative employment characteristics or stereotyped characterizations of one or the other sex, or upon preference based on sex of the recipient, employees, students, or other persons, but nothing contained in this section shall prevent a recipient from considering an employee's sex in relation to employment in a locker room or toilet facility used only by members of one sex.

Subpart F—Procedures

§ 17.600 Notice of covered programs.

Within 60 days of March 6, 2003, each component of the Department that awards Federal financial assistance shall publish in the FEDERAL REGISTER a notice of the programs covered by these Title IX regulations. Each such component shall periodically republish the notice of covered programs to reflect changes in covered programs. Copies of this notice also shall be made available upon request to the Department's office that enforces Title IX.

§ 17.605 Enforcement procedures.

The investigative, compliance, and enforcement procedural provisions of Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d) (''Title VI'') are hereby adopted and applied to these Title IX regulations. These procedures may be found at 6 CFR part 21.

§ 17.635 Forms and instructions; coordination.

(a) *Forms and instructions.* The designated agency official shall issue and promptly make available to interested persons forms and detailed instructions and procedures for effectuating these Title IX regulations.

(b) *Supervision and coordination.* The designated agency official may from time to time assign to officials of the Department, or to officials of other departments or agencies of the Government with the consent of such departments or agencies, responsibilities in connection with the effectuation of the purposes of Title IX and these Title IX regulations (other than responsibility for review as provided in §17.625(e)), including the achievements of effective coordination and maximum uniformity within the Department and within the Executive Branch of the Government in the application of Title IX and these Title IX regulations to similar programs and in similar situations. Any action taken, determination made, or requirement imposed by an official of another department or agency acting pursuant to an assignment of responsibility under this section shall have the same effect as though such action had been taken by the designated official of this Department.

PART 21—NONDISCRIMINATION ON THE BASIS OF RACE, COLOR, OR NATIONAL ORIGIN IN PROGRAMS OR ACTIVITIES RECEIVING FEDERAL FINANCIAL ASSISTANCE FROM THE DEPARTMENT OF HOMELAND SECURITY

Sec.

21.1 Purpose.
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APPENDIX A TO PART 21—ACTIVITIES TO WHICH THIS PART APPLIES

APPENDIX B TO PART 21—ACTIVITIES TO WHICH THIS PART APPLIES WHEN A PRIMARY OBJECTIVE OF THE FEDERAL FINANCIAL ASSISTANCE IS TO PROVIDE EMPLOYMENT

AUTHORITY: 5 U.S.C. 310, 42 U.S.C. 2000d–2000d–7.

SOURCE: 68 FR 10904, Mar. 6, 2003, unless otherwise noted.

§21.1 Purpose.

The purpose of this part is to effectuate the provisions of title VI of the Civil Rights Act of 1964 (the Act) to the end that no person in the United States shall, on the grounds of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity receiving Federal financial assistance from the Department of Homeland Security. The provisions established by this part shall be effective for all components of the Department, including all Department components that are transferred to the Department, except to the extent that a Department component already has existing title VI regulations.

§21.3 Application.

(a) This part applies to any program for which Federal financial assistance is authorized under a law administered by the Department, including the types of Federal financial assistance listed in appendix A to this part. It also applies to money paid, property transferred, or other Federal financial assistance extended after the effective date of this part pursuant to an application approved before that effective date. This part does not apply to:

(1) Any Federal financial assistance by way of insurance or guaranty contracts;

(2) Money paid, property transferred, or other assistance extended before the effective date of this part, except where such assistance was subject to the title VI regulations of any agency whose responsibilities are now exercised by this Department;

(3) Any assistance to any individual who is the ultimate beneficiary; or

(4) Any employment practice, under any such program, of any employer, employment agency, or labor organization, except to the extent described in §21.5(c). The fact that a type of Federal financial assistance is not listed in appendix A to this part shall not mean, if title VI of the Act is otherwise applicable, that a program is not covered. Other types of Federal financial assistance under statutes now in force or hereinafter enacted may be added to appendix A to this part.

(b) In any program receiving Federal financial assistance in the form, or for the acquisition, of real property or an interest in real property, to the extent that rights to space on, over, or under any such property are included as part of the program receiving that assistance, the nondiscrimination requirement of this part shall extend to any facility located wholly or in part in that space.

§ 21.4 Definitions.

Unless the context requires otherwise, as used in this part:

(a) *Applicant* means a person who submits an application, request, or plan required to be approved by the Secretary, or designee thereof, or by a primary recipient, as a condition to eligibility for Federal financial assistance, and application means such an application, request, or plan.

(b) *Facility* includes all or any part of structures, equipment, or other real or personal property or interests therein, and the provision of facilities includes the construction, expansion, renovation, remodeling, alteration or acquisition of facilities.

(c) *Federal financial assistance* includes:

(1) Grants and loans of Federal funds;

(2) The grant or donation of Federal property and interests in property;

(3) The detail of Federal personnel;

(4) The sale and lease of, and the permission to use (on other than a casual or transient basis), Federal property or any interest in such property without consideration or at a nominal consideration, or at a consideration which is reduced for the purpose of assisting the recipient, or in recognition of the public interest to be served by such sale or lease to the recipient; and

(5) Any Federal agreement, arrangement, or other contract which has as one of its purposes the provision of assistance.

(d) *Primary recipient* means any recipient that is authorized or required to extend Federal financial assistance to another recipient.

(e) *Program or activity* and *program* mean all of the operations of any entity described in paragraphs (e)(1) through (4) of this section, any part of which is extended Federal financial assistance:

(1)(i) A department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(ii) The entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2)(i) A college, university, or other postsecondary institution, or a public system of higher education; or

(ii) A local educational agency (as defined in 20 U.S.C. 8801), system of vocational education, or other school system;

(3)(i) An entire corporation, partnership, or other private organization, or an entire sole proprietorship—

(A) If assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(B) Which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(ii) The entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization or sole proprietorship; or

(4) Any other entity which is established by two or more of the entities described in paragraph (e)(1), (2), or (3) of this section.

(f) *Recipient* may mean any State, territory, possession, the District of Columbia, or the Commonwealth of Puerto Rico, or any political subdivision thereof, or instrumentality thereof, any public or private agency, institution, or organization, or other entity, or any individual, in any State, territory, possession, the District of Columbia, or the Commonwealth of Puerto Rico, to whom Federal financial assistance is extended, directly or through another recipient, including any successor, assignee, or transferee thereof, but such term does not include any ultimate beneficiary.

(g) *Secretary* means the Secretary of the Department of Homeland Security or, except in §21.17(e), any delegatee of the Secretary.

§21.5 Discrimination prohibited.

(a) *General.* No person in the United States shall, on the grounds of race, color, or national origin be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under, any program to which this part applies.

(b) *Specific discriminatory actions prohibited.* (1) A recipient to which this part applies may not, directly or through contractual or other arrangements, on the grounds of race, color, or national origin:

(i) Deny a person any service, financial aid, or other benefit provided under the program;

(ii) Provide any service, financial aid, or other benefit to a person which is different, or is provided in a different manner, from that provided to others under the program;

(iii) Subject a person to segregation or separate treatment in any matter related to his receipt of any service, financial aid, or other benefit under the program;

(iv) Restrict a person in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, financial aid, or other benefit under the program;

(v) Treat a person differently from others in determining whether he satisfies any admission, enrollment, quota, eligibility, membership, or other requirement or condition which persons must meet in order to be provided any service, financial aid, or other benefit provided under the program;

(vi) Deny a person an opportunity to participate in the program through the provision of services or otherwise or afford him an opportunity to do so which is different from that afforded others under the program; or

(vii) Deny a person the opportunity to participate as a member of a planning, advisory, or similar body which is an integral part of the program.

(2) A recipient, in determining the types of services, financial aid, or other benefits, or facilities which will be provided under any such program, or the class of person to whom, or the situations in which, such services, financial aid, other benefits, or facilities will be provided under any such program, or the class of persons to be afforded an opportunity to participate in any such program; may not, directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting persons to discrimination because of their race, color, or national origin or have the effect of defeating or substantially impairing accomplishment of the objectives of the program with respect to individuals of a particular race, color, or national origin.

(3) In determining the site or location of facilities, a recipient or applicant may not make selections with the purpose or effect of excluding persons from, denying them the benefits of, or subjecting them to discrimination under any program to which this regulation applies, on the grounds of race, color, or national origin; or with the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the Act or this part.

(4) As used in this section the services, financial aid, or other benefits provided under a program receiving Federal financial assistance include any service, financial aid, or other benefit provided in or through a facility provided with the aid of Federal financial assistance.

(5) The enumeration of specific forms of prohibited discrimination in this paragraph does not limit the generality of the prohibition in paragraph (a) of this section.

(6) This part does not prohibit the consideration of race, color, or national origin if the purpose and effect are to remove or overcome the consequences of practices or impediments which have restricted the availability of, or participation in, the program or activity receiving Federal financial assistance, on the grounds of race, color, or national origin. Where prior discriminatory practice or usage tends, on the grounds of race, color, or national origin to exclude individuals from participation in, to deny them the benefits of, or to subject them to discrimination under any program or activity to

which this part applies, the applicant or recipient must take affirmative action to remove or overcome the effects of the prior discriminatory practice or usage. Even in the absence of prior discriminatory practice or usage, a recipient in administering a program or activity to which this part applies, may take affirmative action to assure that no person is excluded from participation in or denied the benefits of the program or activity on the grounds of race, color, or national origin.

(c) *Employment practices.* (1) Where a primary objective of the Federal financial assistance to a program to which this part applies is to provide employment, a recipient subject to this part shall not, directly or through contractual or other arrangements, subject a person to discrimination on the ground of race, color, or national origin in its employment practices under such program (including recruitment or recruitment advertising, hiring, firing, upgrading, promotion, demotion, transfer, layoff, termination, rates of pay or other forms of compensation or benefits, selection for training or apprenticeship, and use of facilities). Such recipient shall take affirmative action to insure that applicants are employed, and employees are treated during employment, without regard to their race, color, or national origin. The requirements applicable to construction employment under any such program shall be those specified in or pursuant to Part III of Executive Order 11246 or any Executive order which supersedes it.

(2) Federal financial assistance to programs under laws funded or administered by the Department which have as a primary objective the providing of employment include those set forth in appendix B to this part.

(3) Where a primary objective of the Federal financial assistance is not to provide employment, but discrimination on the grounds of race, color, or national origin in the employment practices of the recipient or other persons subject to the regulation tends, on the grounds of race, color, or national origin, to exclude individuals from participation in, deny them the benefits of, or subject them to discrimination under any program to which this regulation applies, the provisions of paragraph (c)(1) of this section shall apply to the employment practices of the recipient or other persons subject to the regulation, to the extent necessary to assure equality of opportunity to, and nondiscriminatory treatment of, beneficiaries.

(d) *Facility location or site.* A recipient may not make a selection of a site or location of a facility if the purpose of that selection, or its effect when made, is to exclude individuals from participation in, to deny them the benefits of, or to subject them to discrimination under any program or activity to which this rule applies, on the grounds of race, color, or national origin; or if the purpose is to, or its effect when made will substantially impair the accomplishment of the objectives of this part.

§ 21.7 Assurances required.

(a) *General.* (1) Every application for Federal financial assistance to which this part applies, except an application to which paragraph (b) of this section applies, and every application for Federal financial assistance to provide a facility shall, as a condition to its approval and the extension of any Federal financial assistance pursuant to the application, contain or be accompanied by, an assurance that the program will be conducted or the facility operated in compliance with all requirements imposed by or pursuant to this part. Every award of Federal financial assistance shall require the submission of such an assurance. In the case where the Federal financial assistance is to provide or is in the form of personal property, or real property or interest therein or structures thereon, the assurance shall obligate the recipient, or, in the case of a subsequent transfer, the transferee, for the period during which the property is used for a purpose for which the Federal financial assistance is extended or for another purpose involving the provision of similar services or benefits, or for as long as the recipient retains ownership or possession of the property, whichever is longer. In all other cases the assurance shall obligate the recipient for

the period during which Federal financial assistance is extended to the program. The Secretary shall specify the form of the foregoing assurances, and the extent to which like assurances will be required of subgrantees, contractors and subcontractors, transferees, successors in interest, and other participants. Any such assurance shall include provisions which give the United States a right to seek its judicial enforcement.

(2) In the case where Federal financial assistance is provided in the form of a transfer of real property, structures, or improvements thereon, or interest therein, from the Federal Government, the instrument effecting or recording the transfer shall contain a covenant running with the land assuring nondiscrimination for the period during which the real property is used for a purpose for which the Federal financial assistance is extended or for another purpose involving the provision of similar services or benefits. Where no transfer of property or interest therein from the Federal Government is involved, but property is acquired or improved with Federal financial assistance, the recipient shall agree to include such covenant in any subsequent transfer of such property. When the property is obtained from the Federal Government, such covenant may also include a condition coupled with a right to be reserved by the Department to revert title to the property in the event of a breach of the covenant where, in the discretion of the Secretary, such a condition and right of reverter is appropriate to the statute under which the real property is obtained and to the nature of the grant and the grantee. In such event if a transferee of real property proposes to mortgage or otherwise encumber the real property as security for financing construction of new, or improvement of existing, facilities on such property for the purposes for which the property was transferred, the Secretary may agree, upon request of the transferee and if necessary to accomplish such financing, and upon such conditions as he deems appropriate, to subordinate such right of reversion to the lien of such mortgage or other encumbrance.

(b) *Continuing Federal financial assistance.* Every application by a State or a State agency for continuing Federal financial assistance to which this part applies (including the types of Federal financial assistance listed in appendix A to this part) shall as a condition to its approval and the extension of any Federal financial assistance pursuant to the application:

(1) Contain or be accompanied by a statement that the program is (or, in the case of a new program, will be) conducted in compliance with all requirements imposed by or pursuant to this part; and

(2) Provide or be accompanied by provision for such methods of administration for the program as are found by the Secretary to give reasonable guarantee that the applicant and all recipients of Federal financial assistance under such program will comply with all requirements imposed by or pursuant to this part.

(c) *Assurance from institutions.* (1) In the case of any application for Federal financial assistance to an institution of higher education (including assistance for construction, for research, for special training projects, for student loans or for any other purpose), the assurance required by this section shall extend to admission practices and to all other practices relating to the treatment of students.

(2) The assurance required with respect to an institution of higher education, hospital, or any other institution, insofar as the assurance relates to the institution's practices with respect to admission or other treatment of individuals as students, patients, or clients of the institution or to the opportunity to participate in the provision of services or other benefits to such individuals, shall be applicable to the entire institution.

§21.9 Compliance information.

(a) *Cooperation and assistance.* The Secretary shall to the fullest extent practicable seek the cooperation of recipients in obtaining compliance with this part and shall provide assistance and guidance to recipients to help them comply voluntarily with this part.

(b) *Compliance reports.* Each recipient shall keep such records and submit to the Secretary timely, complete, and accurate compliance reports at such times, and in such form and containing such information, as the Secretary may determine to be necessary to enable him to ascertain whether the recipient has complied or is complying with this part. In the case in which a primary recipient extends Federal financial assistance to any other recipient, such other recipient shall also submit such compliance reports to the primary recipient as may be necessary to enable the primary recipient to carry out its obligations under this part. In general, recipients should have available for the Secretary racial and ethnic data showing the extent to which members of minority groups are beneficiaries of programs receiving Federal financial assistance.

(c) *Access to sources of information.* Each recipient shall permit access by the Secretary during normal business hours to such of its books, records, accounts, and other sources of information, and its facilities as may be pertinent to ascertain compliance with this part. Where any information required of a recipient is in the exclusive possession of any other agency, institution, or person and this agency, institution, or person fails or refuses to furnish this information, the recipient shall so certify in its report and shall set forth what efforts it has made to obtain the information.

(d) *Information to beneficiaries and participants.* Each recipient shall make available to participants, beneficiaries, and other interested persons such information regarding the provisions of this part and its applicability to the program for which the recipient receives Federal financial assistance, and make such information available to them in such manner, as the Secretary finds necessary to apprise such persons of the protections against discrimination assured them by the Act and this part.

§ 21.11 Conduct of investigations.

(a) *Periodic compliance reviews.* The Secretary shall from time to time review the practices of recipients to determine whether they are complying with this part.

(b) *Complaints.* Any person who believes that he or she, or any specific class of persons, has been subjected to discrimination prohibited by this part may by himself or herself, or by a representative, file with the Secretary a written complaint. A complaint must be filed not later than 180 days after the date of the alleged discrimination, unless the time for filing is extended by the Secretary.

(c) *Investigations.* The Secretary will make a prompt investigation whenever a compliance review, report, complaint, or any other information indicates a possible failure to comply with this part. The investigation will include, where appropriate, a review of the pertinent practices and policies of the recipient, the circumstances under which the possible noncompliance with this part occurred, and other factors relevant to a determination as to whether the recipient has failed to comply with this part.

(d) *Resolution of matters.* (1) If an investigation pursuant to paragraph (c) of this section indicates a failure to comply with this part, the Secretary will so inform the recipient and the matter will be resolved by informal means whenever possible. If it has been determined that the matter cannot be resolved by informal means, action will be taken as provided for in § 21.13.

(2) If an investigation does not warrant action pursuant to paragraph (d)(1) of this section the Secretary will so inform the recipient and the complainant, if any, in writing.

(e) *Intimidatory or retaliatory acts prohibited.* No recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by section 601 of the Act or this part, or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this part. The identity of complainants shall be kept confidential except to the extent necessary to carry out the purposes of this part, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder.

§21.13 Procedure for effecting compliance.

(a) *General*. If there appears to be a failure or threatened failure to comply with this part, and if the noncompliance or threatened noncompliance cannot be corrected by informal means, compliance with this part may be effected by the suspension or termination of or refusal to grant or to continue Federal financial assistance or by any other means authorized by law. Such other means may include, but are not limited to:

(1) A referral to the Department of Justice with a recommendation that appropriate proceedings be brought to enforce any rights of the United States under any law of the United States (including other titles of the Act), or any assurance or other contractual undertaking; and

(2) Any applicable proceeding under State or local law.

(b) *Noncompliance with §21.7*. If an applicant fails or refuses to furnish an assurance required under §21.7 or otherwise fails or refuses to comply with a requirement imposed by or pursuant to that section, Federal financial assistance may be refused in accordance with the procedures of paragraph (c) of this section. The Department shall not be required to provide assistance in such a case during the pendency of the administrative proceedings under such paragraph. However, subject to §21.21, the Department shall continue assistance during the pendency of such proceedings where such assistance is due and payable pursuant to an application approved prior to the effective date of this part.

(c) *Termination of or refusal to grant or to continue Federal financial assistance*. (1) No order suspending, terminating, or refusing to grant or continue Federal financial assistance shall become effective until:

(i) The Secretary has advised the applicant or recipient of his failure to comply and has determined that compliance cannot be secured by voluntary means;

(ii) There has been an express finding on the record, after opportunity for hearing, of a failure by the applicant or recipient to comply with a requirement imposed by or pursuant to this part;

(iii) The action has been approved by the Secretary pursuant to §21.17(e); and

(iv) The expiration of 30 days after the Secretary has filed with the committee of the House and the committee of the Senate having legislative jurisdiction over the program involved, a full written report of the circumstances and the grounds for such action.

(2) Any action to suspend or terminate or to refuse to grant or to continue Federal financial assistance shall be limited to the particular political entity, or part thereof, or other applicant or recipient as to whom such a finding has been made and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found.

(d) *Other means authorized by law*. No action to effect compliance with title VI of the Act by any other means authorized by law shall be taken by this Department until:

(1) The Secretary has determined that compliance cannot be secured by voluntary means;

(2) The recipient or other person has been notified of its failure to comply and of the action to be taken to effect compliance; and

(3) The expiration of at least 10 days from the mailing of such notice to the recipient or other person. During this period of at least 10 days, additional efforts shall be made to persuade the recipient or other person to comply with the regulation and to take such corrective action as may be appropriate.

§21.15 Hearings.

(a) *Opportunity for hearing*. Whenever an opportunity for a hearing is required by §21.13(c), reasonable notice shall be given by registered or certified mail, return receipt requested, to the affected applicant or recipient. This notice shall advise the applicant or recipient of the action proposed to be taken, the specific provision under which the proposed action against it is to be taken, and the matters of fact or law asserted as the basis for this action, and either:

(1) Fix a date not less than 20 days after the date of such notice within which the applicant or recipient may

request of the Secretary that the matter be scheduled for hearing; or

(2) Advise the applicant or recipient that the matter in question has been set down for hearing at a stated place and time. The time and place so fixed shall be reasonable and shall be subject to change for cause. The complainant, if any, shall be advised of the time and place of the hearing. An applicant or recipient may waive a hearing and submit written information and argument for the record. The failure of an applicant or recipient to request a hearing under this paragraph or to appear at a hearing for which a date has been set shall be deemed to be a waiver of the right to a hearing under section 602 of the Act and § 21.13(c) and consent to the making of a decision on the basis of such information as is available.

(b) *Time and place of hearing.* Hearings shall be held at the offices of the Department in Washington, DC, at a time fixed by the Secretary unless he determines that the convenience of the applicant or recipient or of the Department requires that another place be selected. Hearings shall be held before the Secretary, or at his discretion, before a hearing examiner appointed in accordance with section 3105 of title 5, United States Code, or detailed under section 3344 of title 5, United States Code.

(c) *Right to counsel.* In all proceedings under this section, the applicant or recipient and the Department shall have the right to be represented by counsel.

(d) *Procedures, evidence, and record.* (1) The hearing, decision, and any administrative review thereof shall be conducted in conformity with sections 554 through 557 of title 5, United States Code, and in accordance with such rules of procedure as are proper (and not inconsistent with this section) relating to the conduct of the hearing, giving of notices subsequent to those provided for in paragraph (a) of this section, taking of testimony, exhibits, arguments and briefs, requests for findings, and other related matters. Both the Department and the applicant or recipient shall be entitled to introduce all relevant evidence on the issues as stated in the notice for hearing or as determined by the officer conducting the hearing at the outset of or during the hearing.

(2) Technical rules of evidence do not apply to hearings conducted pursuant to this part, but rules or principles designed to assure production of the most credible evidence available and to subject testimony to test by cross-examination shall be applied where reasonably necessary by the officer conducting the hearing. The hearing officer may exclude irrelevant, immaterial, or unduly repetitious evidence. All documents and other evidence offered or taken for the record shall be open to examination by the parties and opportunity shall be given to refute facts and arguments advanced on either side of the issues. A transcript shall be made of the oral evidence except to the extent the substance thereof is stipulated for the record. All decisions shall be based upon the hearing record and written findings shall be made.

(e) *Consolidated or joint hearings.* In cases in which the same or related facts are asserted to constitute noncompliance with this part with respect to two or more Federal statutes, authorities, or other means by which Federal financial assistance is extended and to which this part applies, or noncompliance with this part and the regulations of one or more other Federal departments or agencies issued under title VI of the Act, the Secretary may, by agreement with such other departments or agencies, where applicable, provide for the conduct of consolidated or joint hearings, and for the application to such hearings of rules or procedures not inconsistent with this part. Final decisions in such cases, insofar as this regulation is concerned, shall be made in accordance with § 21.17.

§ 21.17 Decisions and notices.

(a) *Procedure on decisions by hearing examiner.* If the hearing is held by a hearing examiner, the hearing examiner shall either make an initial decision, if so authorized, or certify the entire record including his recommended findings and proposed decision to the Secretary for a final decision, and a copy of such initial decision or certification shall be mailed to the applicant or recipient. Where the initial decision

is made by the hearing examiner the applicant or recipient may, within 30 days after the mailing of such notice of initial decision, file with the Secretary his exceptions to the initial decision, with his reasons therefor. In the absence of exceptions, the Secretary may, on his own motion, within 45 days after the initial decision, serve on the applicant or recipient a notice that he will review the decision. Upon the filing of such exceptions or of notice of review, the Secretary shall review the initial decision and issue his own decision thereon including the reasons therefor. In the absence of either exceptions or a notice of review the initial decision shall, subject to paragraph (e) of this section, constitute the final decision of the Secretary.

(b) *Decisions on record or review by the Secretary*. Whenever a record is certified to the Secretary for decision or he reviews the decision of a hearing examiner pursuant to paragraph (a) of this section, or whenever the Secretary conducts the hearing, the applicant or recipient shall be given reasonable opportunity to file with him briefs or other written statements of its contentions, and a written copy of the final decision of the Secretary shall be sent to the applicant or recipient and to the complainant, if any.

(c) *Decisions on record where a hearing is waived*. Whenever a hearing is waived pursuant to §21.15, a decision shall be made by the Secretary on the record and a written copy of such decision shall be sent to the applicant or recipient, and to the complainant, if any.

(d) *Rulings required*. Each decision of a hearing examiner or the Secretary shall set forth his ruling on each finding, conclusion, or exception presented, and shall identify the requirement or requirements imposed by or pursuant to this part with which it is found that the applicant or recipient has failed to comply.

(e) *Approval by Secretary*. Any final decision by an official of the Department, other than the Secretary personally, which provides for the suspension or termination of, or the refusal to grant or continue Federal financial assistance, or the imposition of any other sanction available under this part or the Act, shall promptly be transmitted to the Secretary personally, who may approve such decision, may vacate it, or remit or mitigate any sanction imposed.

(f) *Content of orders*. The final decision may provide for suspension or termination of, or refusal to grant or continue Federal financial assistance, in whole or in part, to which this regulation applies, and may contain such terms, conditions, and other provisions as are consistent with and will effectuate the purposes of the Act and this part, including provisions designed to assure that no Federal financial assistance to which this regulation applies will thereafter be extended to the applicant or recipient determined by such decision to be in default in its performance of an assurance given by it pursuant to this part, or to have otherwise failed to comply with this part, unless and until it corrects its noncompliance and satisfies the Secretary that it will fully comply with this part.

(g) *Post termination proceedings*. (1) An applicant or recipient adversely affected by an order issued under paragraph (f) of this section shall be restored to full eligibility to receive Federal financial assistance if it satisfies the terms and conditions of that order for such eligibility or if it brings itself into compliance with this part and provides reasonable assurance that it will fully comply with this part.

(2) Any applicant or recipient adversely affected by an order entered pursuant to paragraph (f) of this section may at any time request the Secretary to restore fully its eligibility to receive Federal financial assistance. Any such request shall be supported by information showing that the applicant or recipient has met the requirements of paragraph (g)(1) of this section. If the Secretary determines that those requirements have been satisfied, he shall restore such eligibility.

(3) If the Secretary denies any such request, the applicant or recipient may submit a request for a hearing in writing, specifying why it believes such official to have been in error. It shall thereupon be given an expeditious hearing, with a decision on the record in accordance with rules or procedures issued by the Secretary. The applicant

or recipient will be restored to such eligibility if it proves at such a hearing that it satisfied the requirements of paragraph (g)(1) of this section. While proceedings under this paragraph are pending, the sanctions imposed by the order issued under paragraph (f) of this section shall remain in effect.

§ 21.19 Judicial review.

Action taken pursuant to section 602 of the Act is subject to judicial review as provided in section 603 of the Act.

§ 21.21 Effect on other regulations, forms, and instructions.

(a) *Effect on other regulations.* All regulations, orders, or like directions issued before the effective date of this part by any officer of the Department which impose requirements designed to prohibit any discrimination against individuals on the grounds of race, color, or national origin under any program to which this part applies, and which authorize the suspension or termination of or refusal to grant or to continue Federal financial assistance to any applicant for a recipient of such assistance for failure to comply with such requirements, are hereby superseded to the extent that such discrimination is prohibited by this part, except that nothing in this part may be considered to relieve any person of any obligation assumed or imposed under any such superseded regulation, order, instruction, or like direction before the effective date of this part. Nothing in this part, however, supersedes any of the following (including future amendments thereof):

(1) Executive Order 11246 (3 CFR, 1965 Supp., p. 167) and regulations issued thereunder; or

(2) Any other orders, regulations, or instructions, insofar as such orders, regulations, or instructions prohibit discrimination on the ground of race, color, or national origin in any program or situation to which this part is inapplicable, or prohibit discrimination on any other ground.

(b) *Forms and instructions.* The Secretary shall issue and promptly make available to all interested persons forms and detailed instructions and procedures for effectuating this part as applied to programs to which this part applies and for which he is responsible.

(c) *Supervision and coordination.* The Secretary may from time to time assign to officials of the Department, or to officials of other departments or agencies of the Government with the consent of such departments or agencies, responsibilities in connection with the effectuation of the purposes of title VI of the Act and this part (other than responsibility for final decision as provided in § 21.17), including the achievement of effective coordination and maximum uniformity within the Department and within the Executive Branch of the Government in the application of title VI and this part to similar programs and in similar situations. Any action taken, determination made or requirement imposed by an official of another department or agency acting pursuant to an assignment of responsibility under this paragraph shall have the same effect as though such action had been taken by the Secretary of this Department.

APPENDIX A TO PART 21—ACTIVITIES TO WHICH THIS PART APPLIES

NOTE: Failure to list a type of Federal assistance in appendix A shall not mean, if title VI is otherwise applicable, that a program is not covered.

1. Lease of real property and the grant of permits, licenses, easements and rights-of-way covering real property under control of the U.S. Coast Guard (14 U.S.C. 93 (n) and (o)).

2. Utilization of U.S. Coast Guard personnel and facilities by any State, territory, possession, or political subdivision thereof (14 U.S.C. 141(a)).

3. Use of U.S. Coast Guard personnel for duty in connection with maritime instruction and training by the States, territories, and the Commonwealth of Puerto Rico (14 U.S.C. 148).

4. Use of obsolete and other U.S. Coast Guard material by sea scout service of Boy Scouts of America, any incorporated unit of the U.S. Coast Guard auxiliary, and public body or private organization not organized for profit (14 U.S.C. 641(a)).

5. U.S. Coast Guard Auxiliary Program (14 U.S.C. 821–832).

6. U.S. Coast Guard Boating Safety Financial Assistance program.

7. U.S. Coast Guard State Access to Oil Spill Liability Trust Fund.

8. U.S. Coast Guard Bridge Alteration.

9. Use of Customs personnel and facilities by any State, territory, possession, or political subdivision thereof.

10. Use of Customs personnel for duty in connection with instruction and training by the States, territories and the Commonwealth of Puerto Rico.

11. Grants to educational institutions, associations, States, or other entities for research, analysis, or programs or strategies relating to trade issues.

APPENDIX B TO PART 21—ACTIVITIES TO WHICH THIS PART APPLIES WHEN A PRIMARY OBJECTIVE OF THE FEDERAL FINANCIAL ASSISTANCE IS TO PROVIDE EMPLOYMENT

NOTE: Failure to list a type of Federal assistance in appendix B shall not mean, if title VI is otherwise applicable, that a program is not covered.

[Reserved]

PART 25—REGULATIONS TO SUPPORT ANTI-TERRORISM BY FOSTERING EFFECTIVE TECHNOLOGIES

Sec.
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AUTHORITY: Subtitle G, Title VIII, Pub. L. 107–296, 116 Stat. 2238 (6 U.S.C. 441–444).

SOURCE: 68 FR 59698, Oct. 16, 2003, unless otherwise noted.

§ 25.1 Purpose.

This part implements the Support Anti-terrorism by Fostering Effective Technologies Act of 2002, Subtitle G of Title VIII of Public Law 107–296 (''the SAFETY Act'' or ''the Act'').

§ 25.2 Delegation.

All of the Secretary's responsibilities, powers, and functions under the SAFETY Act may be exercised by the Under Secretary for Science and Technology of the Department of Homeland Security (''the Under Secretary'') or the Under Secretary's designees.

§ 25.3 Designation of qualified anti-terrorism technologies.

(a) *General*. The Under Secretary may designate as a qualified anti-terrorism technology for purposes of protections set forth in Subtitle G of Title VIII of Public Law 107–296 any qualifying product, equipment, service (including support services), device, or technology (including information technology) designed, developed, modified, or procured for the specific purpose of preventing, detecting, identifying, or deterring acts of terrorism or limiting the harm such acts might otherwise cause.

(b) *Criteria to be considered*. In determining whether to grant the designation under paragraph (a) (a ''Designation''), the Under Secretary may exercise discretion and judgment in interpreting and weighting the following criteria in each case:

(1) Prior United States Government use or demonstrated substantial utility and effectiveness.

(2) Availability of the technology for immediate deployment in public and private settings.

(3) Existence of extraordinarily large or extraordinarily unquantifiable potential third party liability risk exposure to the Seller or other provider of such anti-terrorism technology.

(4) Substantial likelihood that such anti-terrorism technology will not be deployed unless protections under the system of risk management provided under 6 U.S.C. 441–444 are extended.

(5) Magnitude of risk exposure to the public if such anti-terrorism technology is not deployed.

(6) Evaluation of all scientific studies that can be feasibly conducted in order to assess the capability of the technology to substantially reduce risks of harm.

(7) Anti-terrorism technology that would be effective in facilitating the defense against acts of terrorism, including technologies that prevent, defeat or respond to such acts.

(8) Any other factor that the Under Secretary may consider to be relevant to the determination or to the homeland security of the United States.

(c) *Use of standards.* From time to time the Under Secretary may develop, issue, revise, and adopt technical standards for various categories of anti-terrorism technologies. Such standards will be published by the Department at *http://www.dhs.gov,* and copies may also be obtained by mail by sending a request to: Directorate of Science and Technology, SAFETY Act/room 4320, Department of Homeland Security, Washington, DC 20528. Compliance with any such standards that are applicable to a particular anti-terrorism technology may be considered before any Designation will be granted for such technology under paragraph (a) of this section; in such cases, the Under Secretary may consider test results produced by an independent laboratory or other entity engaged to test or verify the safety, utility, performance, or effectiveness of such technology.

(d) *Consideration of substantial equivalence.* In determining whether a particular technology satisfies the criteria in paragraph (b) and complies with any applicable standards referenced in paragraph (c), the Under Secretary may take into consideration evidence that the technology is substantially equivalent to other, similar technologies (''predicate technologies'') that have been previously designated as ''qualified anti-terrorism technologies'' under the SAFETY Act. A technology may be deemed to be substantially equivalent to a predicate technology if:

(1) It has the same intended use as the predicate technology; and

(2) It has the same or substantially similar technological characteristics as the predicate technology.

(e) *Duration and depth of review.* Recognizing the urgency of certain security measures, the Under Secretary will make a judgment regarding the duration and depth of review appropriate for a particular technology. This review will include submissions by the applicant for SAFETY Act coverage, along with information that the Under Secretary can feasibly gather from other sources. For technologies with which a Federal, state, or local government agency already has substantial experience or data (through the procurement process or through prior use or review), the review may rely in part upon that prior experience and, thus, may be expedited. The Under Secretary may consider any scientific studies, testing, field studies, or other experience with the technology that he deems appropriate and that are available or can be feasibly conducted or obtained in order to assess the capability of the technology to substantially reduce risks of harm. Such studies may, in the Under Secretary's discretion, include:

(1) Public source studies;

(2) Classified and otherwise confidential studies;

(3) Studies, tests, or other performance records or data provided by or available to the producer of the specific technology; and

(4) Proprietary studies that are available to the Under Secretary.

In considering whether or the extent to which it is feasible to defer a decision on a Designation until additional scientific studies can be conducted on a particular technology, the Under Secretary will bring to bear his or her expertise concerning the protection of the security of the American homeland and will consider the urgency of the need for the technology.

(f) *Content of Designation.* A Designation shall specify the technology, the Seller(s) of the technology, and the earliest date of sale of the technology to which the Designation shall apply (which shall be determined by the Under Secretary in his or her discretion, and may be prior to, but shall not be later than, the effective date of the Designation). The Designation may, but need not, also specify others who are required to be covered by the liability insurance required to be purchased by the Seller. The Designation shall include the Under Secretary's certification required by § 25.4(h). The Designation may also include such other specifications as the Under Secretary may deem to be appropriate, including, but not limited to, specific applications of the technology, materials or processes required to be used in producing or using the technology, restrictions on transfer or licensing, and training and instructions required to be provided to persons involved in the

deployment of the technology. Failure to specify a covered person or entity in a Designation will not preclude application of the Act's protections to that person or entity.

(g) *Government procurements.* The Under Secretary may coordinate a SAFETY Act review in connection with a Federal, state, or local government agency procurement of an anti-terrorism technology in any manner he or she deems appropriate and consistent with the Act and other applicable laws.

(h) *Pre-application consultations.* To the extent that he or she deems it appropriate, the Under Secretary may consult with potential SAFETY Act applicants regarding the need for or advisability of particular types of anti-terrorism technologies, although no pre-approval of any particular technology may be given. Such potential applicants may request such consultations through the Pre-Application process set forth in the SAFETY Act Application Kit. The confidentiality provisions in § 25.8 shall be applicable to such consultations.

§ 25.4 Obligations of seller.

(a) *Liability insurance required.* The Seller shall obtain liability insurance of such types and in such amounts as shall be required in the applicable Designation, which shall be the amounts and types certified by the Under Secretary to satisfy otherwise compensable third-party claims arising out of, relating to, or resulting from an act of terrorism when qualified anti-terrorism technologies have been deployed in defense against, response to, or recovery from, such act. Notwithstanding the foregoing, if the Under Secretary determines that insurance in appropriate amounts or of appropriate types is not available for a particular technology, the Under Secretary may authorize a Seller to self-insure and prescribe the amount and terms of the Seller's liability in the applicable Designation, which amount and terms shall be such as will not unreasonably distort the sales price of the Seller's anti-terrorism technology. The Under Secretary may request at any time (before or after the insurance certification process established under this section) that the Seller or any other provider of qualified anti-terrorism technology submit any information that would:

(1) Assist in determining the amount of liability insurance required, or

(2) Show that the Seller or any other provider of qualified anti-terrorism technology otherwise has met all the requirements of this section.

(b) *Maximum Amount.* For the total claims related to one act of terrorism, in determining the required amounts and types of liability insurance that the Seller will be required to obtain, the Under Secretary shall not require the Seller to obtain liability insurance of more than the maximum amount of liability insurance reasonably available from private sources on the world market at prices and terms that will not unreasonably distort the sales price of the Seller's anti-terrorism technology. The Under Secretary will determine the amount of liability insurance required for each technology, or, to the extent feasible and appropriate, a particular group of technologies. The Under Secretary or his designee may find that—notwithstanding the level of risk exposure for a particular technology, or group of technologies—the maximum amount of liability insurance from private sources on the world market is set at a price or contingent on terms that will unreasonably distort the sales price of a Seller's technology, thereby necessitating liability insurance coverage below the maximum amount available. In determining the amount of liability insurance required, the Under Secretary may consider any factor, including, but not limited to, the following:

(1) The particular technology at issue;

(2) The amount of liability insurance the Seller maintained prior to application;

(3) The amount of liability insurance maintained by the Seller for other technologies or for the Seller's business as a whole;

(4) The amount of liability insurance typically maintained by sellers of comparable technologies;

(5) Information regarding the amount of liability insurance offered on the world market;

(6) Data and history regarding mass casualty losses;

(7) The intended use of the technology;

(8) The possible effects of the cost of insurance on the price of the product, and the possible consequences thereof for development, production, or deployment of the technology; and

(9) In the case of a Seller seeking approval to self-insure, the factors described in 48 CFR 28.308(d).

(c) *Scope of coverage*. Liability insurance required to be obtained (or self-insurance required) pursuant to this section shall, in addition to the Seller, protect the following, to the extent of their potential liability for involvement in the manufacture, qualification, sale, use, or operation of qualified anti-terrorism technologies deployed in defense against, response to, or recovery from, an act of terrorism:

(1) Contractors, subcontractors, suppliers, vendors and customers of the Seller.

(2) Contractors, subcontractors, suppliers, and vendors of the customer.

(d) *Third party claims*. Any liability insurance required to be obtained (or self-insurance required) pursuant to this section shall provide coverage against third party claims arising out of, relating to, or resulting from an act of terrorism when the applicable qualified anti-terrorism technologies have been deployed in defense against, response to, or recovery from such act.

(e) *Reciprocal waiver of claims*. The Seller shall enter into a reciprocal waiver of claims with its contractors, subcontractors, suppliers, vendors, and customers, and contractors and subcontractors of the customers, involved in the manufacture, sale, use, or operation of qualified anti-terrorism technologies, under which each party to the waiver agrees to be responsible for losses, including business interruption losses, that it sustains, or for losses sustained by its own employees resulting from an activity resulting from an act of terrorism when qualified anti-terrorism technologies have been deployed in defense against, response to, or recovery from such act. Notwithstanding the foregoing, if the Seller has used diligent efforts in good faith to obtain all required reciprocal waivers, then obtaining such waivers shall not be a condition precedent or subsequent for, nor shall the failure to obtain one or more of such waivers adversely affect, the issuance, validity, effectiveness, duration, or applicability of a Designation or a Certification. Nothing in this paragraph (e) shall be interpreted to render the failure to obtain one or more of such waivers a condition precedent or subsequent for the issuance, validity, effectiveness, duration, or applicability of a Designation or a Certification.

(f) *Extent of liability*. Liability for all claims against a Seller arising out of, relating to, or resulting from an act of terrorism when such Seller's qualified anti-terrorism technology has been deployed in defense against, response to, or recovery from such act in accordance with the applicable Designation and such claims result or may result in loss to the Seller, whether for compensatory or punitive damages or for contribution or indemnity, shall not be in an amount greater than the limits of liability insurance coverage required to be maintained by the Seller under this Section, or, in the case of a Seller authorized by the Under Secretary to self-insure pursuant to this Section, shall not be in an amount greater than the liability limit prescribed by the Under Secretary in the applicable Designation.

(1) In addition, in any action brought under Section 863 of the Act for damages:

(i) No punitive damages intended to punish or deter, exemplary damages, or other damages not intended to compensate a plaintiff for actual losses may be awarded, nor shall any party be liable for interest prior to the judgment,

(ii) Noneconomic damages may be awarded against a defendant only in an amount directly proportional to the percentage of responsibility of such defendant for the harm to the plaintiff, and no plaintiff may recover noneconomic damages unless the plaintiff suffered physical harm, and

(iii) any recovery by a plaintiff shall be reduced by the amount of collateral source compensation, if any, that the plaintiff has received or is entitled to

receive as a result of such acts of terrorism that result or may result in loss to the Seller.

(2) Without prejudice to the authority of the Under Secretary to terminate a Designation pursuant to paragraph (h) of this Section, such liability limitations and reductions shall apply in perpetuity to all deployments of a qualified anti-terrorism technology that occur on or after the effective date of the Designation applicable to such technology in defense against, response to, or recovery from any act of terrorism, regardless of whether any liability insurance coverage required to be obtained by the Seller is actually maintained or not, provided that the sale of such technology was consummated by the Seller on or after the earliest date of sale of such technology specified in such Designation (which shall be determined by the Under Secretary in his or her discretion, and may be prior to, but shall not be later than, such effective date) and prior to the expiration or termination of such Designation.

(g) *Information to be submitted by the Seller*. As part of any application for a Designation, the Seller shall provide a statement, executed by a duly authorized representative of the Seller, of all liability insurance coverage applicable to third-party claims arising out of, relating to, or resulting from an act of terrorism when the Seller's qualified anti-terrorism technology has been deployed in defense against, response to, or recovery from such act, including:

(1) Names of insurance companies, policy numbers, and expiration dates;

(2) A description of the types and nature of such insurance (including the extent to which the Seller is self-insured or intends to self-insure);

(3) Dollar limits per occurrence and annually of such insurance, including any applicable sublimits;

(4) Deductibles or self-insured retentions, if any, that are applicable;

(5) Any relevant exclusions from coverage under such policies;

(6) The price for such insurance, if available, and the per-unit amount or percentage of such price directly related to liability coverage for the Seller's qualified anti-terrorism technology deployed in defense against, or response to, or recovery from an act of terror;

(7) Where applicable, whether the liability insurance, in addition to the Seller, protects contractors, subcontractors, suppliers, vendors and customers of the Seller and contractors, subcontractors, suppliers, vendors and customers of the customer to the extent of their potential liability for involvement in the manufacture, qualification, sale, use or operation of Qualified Anti-terrorism Technologies deployed in defense against, response to, or recovery from an act of terrorism;

(8) Any limitations on such liability insurance; and

(9) In the case of a Seller seeking approval to self-insure, all of the information described in 48 CFR 28.308(a)(1) through (10).

(h) *Under Secretary's certification*. For each qualified anti-terrorism technology, the Under Secretary shall certify the amount of insurance required under Section 864 of the Act. The Under Secretary shall include the certification under this section as a part of the applicable Designation. The certification may specify a period of time for which the certification will apply. The Seller of a qualified anti-terrorism technology may at any time petition the Under Secretary for a revision or termination of the certification under this section. The Under Secretary or his designee may at any time request information from the Seller regarding the insurance maintained by the Seller or the amount of insurance available to the Seller.

(i) *Seller's continuing obligations*. Within 30 days after the Under Secretary's certification required by paragraph (h), and within 30 days after each subsequent anniversary of the issuance of a Designation, the Seller shall certify to the Under Secretary that the Seller has maintained the insurance required by such certification. The Under Secretary may terminate a Designation if the Seller fails to provide the certification required by this paragraph or provides a false certification. The Under Secretary may also consider

such failure to provide the certification or provision of a false certification when reviewing future applications from the same Seller. The Seller must also notify the Under Secretary of any changes in types or amounts of liability insurance coverage for any qualified anti-terrorism technology.

§ 25.5 Procedures for designation of qualified anti-terrorism technologies.

(a) *Application procedure.* Any Seller seeking a designation shall submit information supporting such request to the Assistant Secretary for Plans, Programs, and Budget of the Department of Homeland Security Directorate of Science and Technology (''the Assistant Secretary''), or such other official of such Directorate as may be designated from time to time by the Under Secretary. The Under Secretary shall make application forms available at *http://www.dhs.gov* and by mail upon request sent to: Directorate of Science and Technology, SAFETY Act/room 4320, Department of Homeland Security, Washington, DC 20528.

(b) *Initial notification.* Within 30 days after receipt of an Application for a Designation, the Assistant Secretary or his or her designee shall notify the applicant in writing that:

(1) The Application is complete and will be reviewed, or

(2) That the Application is incomplete, in which case the missing or incomplete parts will be specified.

(c) *Review process.* The Assistant Secretary or his or her designee will review each complete Application and any included supporting materials. In performing this function, the Assistant Secretary or his or her designee may, but is not required to:

(1) Request additional information from the Seller;

(2) Meet with representatives of the Seller;

(3) Consult with, and rely upon the expertise of, any other Federal or nonfederal entity;

(4) Perform studies or analyses of the technology or the insurance market for such technology; and

(5) Seek information from insurers regarding the availability of insurance for such technology.

(d) *Recommendation of the Assistant Secretary.* (1) Within 90 days after receipt of a complete Application for a Designation, the Assistant Secretary shall make one of the following recommendations to the Under Secretary regarding such Application:

(i) That the Application be approved and a Designation be issued to the Seller;

(ii) That the Seller be notified that the technology is potentially eligible for a Designation, but that additional specified information is needed before a decision may be reached; or

(iii) That the Application be denied.

(2) If approval is recommended, the recommendation shall include a recommendation regarding the certification required by § 25.4(h). The Assistant Secretary may extend the time period beyond 90 days upon notice to the Seller; the Assistant Secretary is not required to provide a reason or cause for such extension.

(e) *Action by the Under Secretary.* Within 30 days after receiving a recommendation from the Assistant Secretary pursuant to paragraph (d) of this section, the Under Secretary shall take one of the following actions:

(1) Approve the Application and issue an appropriate Designation to the Seller, which shall include the certification required by §25.4(h);

(2) Notify the Seller in writing that the technology is potentially eligible for a Designation, but that additional specified information is needed before a decision may be reached; or

(3) Deny the Application, and notify the Seller in writing of such decision. The Under Secretary may extend the time period beyond 30 days upon notice to the Seller; the Under Secretary is not required to provide a reason or cause for such extension. The Under Secretary's decision shall be final and not subject to review, except at the discretion of the Under Secretary.

(f) *Term of Designation; renewal.* A Designation shall be valid and effective for a term of five to eight years (as determined by the Under Secretary based upon the technology) commencing on the date of issuance. At any time commencing two years prior to the expiration of a Designation, the Seller may apply for renewal of the Designation.

The Under Secretary shall make the application form for renewals available at *http://www.dhs.gov* and by mail upon request sent to: Directorate of Science and Technology, SAFETY Act/room 4320, Department of Homeland Security, Washington, DC 20528.

(g) *Transfer of Designation.* (1) Except as may be restricted by the terms and conditions of a Designation, any Designation may be transferred and assigned to any other person or entity to which the Seller transfers and assigns all right, title, and interest in and to the technology covered by the Designation, including the intellectual property rights therein (or, if the Seller is a licensee of the technology, to any person or entity to which such Seller transfers all of its right, title, and interest in and to the applicable license agreement). Such transfer and assignment of a Designation will not be effective unless and until:

(i) The Under Secretary is notified in writing of the transfer using the ''Application for Transfer of Designation'' form issued by the Under Secretary (the Under Secretary shall make this application form available at *http://www.dhs.gov* and by mail by written request sent to: Directorate of Science and Technology, SAFETY Act/room 4320, Department of Homeland Security, Washington, DC 20528), and

(ii) The transferee complies with all applicable provisions of the SAFETY Act, this Part, and the relevant Designation as if the transferee were the Seller.

(2) Upon the effectiveness of such transfer and assignment, the transferee will be deemed to be a Seller in the place and stead of the transferor with respect to the applicable technology for all purposes under the SAFETY Act, this Part, and the transferred Designation. The transferred Designation will continue to apply to the transferor with respect to all transactions and occurrences that occurred through the time at which the transfer and assignment of the Designation became effective, as specified in the applicable Application for Transfer of Designation.

(h) *Application of Designation to licensees.* Except as may be restricted by the terms and conditions of a Designation, any Designation shall apply to any other person or entity to which the Seller licenses (exclusively or non-exclusively) the right to manufacture, use, or and sell the technology, in the same manner and to the same extent that such Designation applies to the Seller, effective as of the date of commencement of the license, provided that the Seller notifies the Under Secretary of such license by submitting, within 30 days after such date of commencement, a ''Notice of License of Qualified Anti-terrorism Technology'' form issued by the Under Secretary. The Under Secretary shall make this form available at *http://www.dhs.gov* and by mail upon request sent to: Directorate of Science and Technology, SAFETY Act/room 4320, Department of Homeland Security, Washington, DC 20528. Such notification shall not be required for any licensee listed as a Seller on the applicable Designation.

(i) *Termination of Designation resulting from significant modification.* A Designation shall terminate automatically, and have no further force or effect, if the designated qualified anti-terrorism technology is significantly changed or modified. A significant change or modification in the technology is one that could significantly reduce the safety or effectiveness of the technology. This could include, in the case of a device, a significant change or modification in design, material, chemical composition, energy source, manufacturing process, or purpose for which it is to be sold, and in the case of a service, a significant change or modification in methodology, procedures, or purpose for which it is to be sold. If a Seller is planning a change or modification to a designated technology, such Seller may apply for a corresponding modification of the applicable Designation in advance of the implementation of such modification. Application for such a modification must be made using the ''Application for Modification of Designation'' form issued by the Under Secretary. The Under Secretary shall make this application form available at *http://www.dhs.gov* and by mail upon request sent to: Directorate of Science and Technology, SAFETY Act/room 4320, Department of Homeland Security, Washington, DC 20528. Changes or modifications will be evaluated at a

minimum with reference to the description of the technology and its purposes as provided in the Seller's application and with reference to what was designated in the applicable Designation. In lieu of issuing a modified Designation in response to such an application, the Under Secretary may elect to issue a certificate to the Seller certifying that the submitted changes or modifications are not significant within the meaning of this paragraph (i) and that the Seller's existing Designation continues to be applicable to the changed or modified technology.

§ 25.6 Government contractor defense.

(a) *Criteria for certification.* The Under Secretary may certify a qualified anti-terrorism technology as an Approved Product for Homeland Security for purposes of establishing a rebuttable presumption of the applicability of the government contractor defense. In determining whether to grant such certification, the Under Secretary or his or her designee shall conduct a comprehensive review of the design of such technology and determine whether it will perform as intended, conforms to the Seller's specifications, and is safe for use as intended. The Seller shall provide safety and hazard analyses and other relevant data and information regarding such technology to the Department in connection with an application. The Under Secretary or his designee may require that the Seller submit any information that the Under Secretary or his designee considers relevant to the application for approval. The Under Secretary or his designee may consult with, and rely upon the expertise of, any other governmental or non-governmental person or entity, and may consider test results produced by an independent laboratory or other person or entity engaged by the Seller.

(b) *Extent of liability.* Should a product liability or other lawsuit be filed for claims arising out of, relating to, or resulting from an act of terrorism when qualified anti-terrorism technologies certified by the Under Secretary as provided in §§ 25.6 and 25.7 of this part have been deployed in defense against or response or recovery from such act and such claims result or may result in loss to the Seller, there shall be a rebuttable presumption that the government contractor defense applies in such lawsuit. This presumption shall only be overcome by evidence showing that the Seller acted fraudulently or with willful misconduct in submitting information to the Assistant Secretary during the course of the Assistant Secretary's consideration of such technology under this subsection. This presumption of the government contractor defense shall apply regardless of whether the claim against the Seller arises from a sale of the product to Federal Government or non-Federal Government customers. Such presumption shall apply in perpetuity to all deployments of a qualified anti-terrorism technology (for which a Certification has been issued by the Under Secretary as provided in this section and § 25.7) that occur on or after the effective date of the Certification applicable to such technology in defense against, response to, or recovery from any act of terrorism, provided that the sale of such technology was consummated by the Seller on or after the earliest date of sale of such technology specified in such Certification (which shall be determined by the Under Secretary in his or her discretion, and may be prior to, but shall not be later than, such effective date) and prior to the expiration or termination of such Certification.

§ 25.7 Procedures for certification of approved products for homeland security.

(a) *Application procedure.* A Seller seeking certification of anti-terrorism technology as an Approved Product for Homeland Security under §25.6 (a ''Certification'') shall submit information supporting such request to the Assistant Secretary. The Under Secretary shall make application forms available at *http://www.dhs.gov*, and copies may also be obtained by mail by sending a request to: Directorate of Science and Technology, SAFETY Act/room 4320, Department of Homeland Security, Washington, DC 20528. An application for a certification may not be filed unless the Seller has also filed an application for designation of qualified anti-terrorism technology for the same technology. The two applications may

be filed simultaneously and may be reviewed simultaneously.

(b) *Initial notification*. Within 30 days after receipt of an Application for a Certification, the Assistant Secretary or his or her designee shall notify the applicant in writing that:

(1) The Application is complete and will be reviewed, or

(2) That the Application is incomplete, in which case the missing or incomplete parts will be specified.

(c) *Review process*. The Assistant Secretary or his or her designee will review each complete Application for a Certification and any included supporting materials. In performing this function, the Assistant Secretary or his or her designee may, but is not required to:

(1) Request additional information from the Seller;

(2) Meet with representatives of the Seller;

(3) Consult with, and rely upon the expertise of, any other Federal or nonfederal entity; and

(4) Perform or seek studies or analyses of the technology.

(d) *Recommendation of the Assistant Secretary*. (1) Within 90 days after receipt of a complete Application for a Certification, the Assistant Secretary shall make one of the following recommendations to the Under Secretary regarding such Application:

(i) That the Application be approved and a Certification be issued to the Seller;

(ii) That the Seller be notified that the technology is potentially eligible for a Certification, but that additional specified information is needed before a decision may be reached; or

(iii) That the Application be denied.

(2) The Assistant Secretary may extend the time period beyond 90 days upon notice to the Seller; the Assistant Secretary is not required to provide a reason or cause for such extension.

(e) *Action by the Under Secretary*. (1) Within 30 days after receiving a recommendation from the Assistant Secretary pursuant to paragraph (d) of this section, the Under Secretary shall take one of the following actions:

(i) Approve the Application and issue an appropriate Certification to the Seller;

(ii) Notify the Seller in writing that the technology is potentially eligible for a Certification, but that additional specified information is needed before a decision may be reached; or

(iii) Deny the Application, and notify the Seller in writing of such decision.

(2) The Under Secretary may extend the time period beyond 30 days upon notice to the Seller, and the Under Secretary is not required to provide a reason or cause for such extension. The Under Secretary's decision shall be final and not subject to review, except at the discretion of the Under Secretary.

(f) *Designation is a pre-condition*. The Under Secretary may approve an application for a certification only if the Under Secretary has also approved an application for a designation for the same technology under section 25.3.

(g) *Content and term of certification; renewal*. A Certification shall specify the technology, the Seller(s) of the technology, and the earliest date of sale of the technology to which the Certification shall apply (which shall be determined by the Under Secretary in his or her discretion, and may be prior to, but shall not be later than, the effective date of the Certification). The Certification may also include such other specifications as the Under Secretary may deem to be appropriate, including, but not limited to, specific applications of the technology, materials or processes required to be used in producing or using the technology, restrictions on transfer or licensing, and training and instructions required to be provided to persons involved in the deployment of the technology. A certification shall be valid and effective for the same period of time for which the related Designation is issued, and shall terminate upon the termination of such related Designation. The Seller may apply for renewal of the Certification in connection with an application for renewal of the related Designation. An application for renewal must be made using the ''Application for Certification of an Approved Product for Homeland Security'' form issued by the Under Secretary.

(h) *Application of Certification to licensees*. Any certification shall apply to any other person or entity to which the

Seller licenses (exclusively or non-exclusively) the right to manufacture and sell the technology, in the same manner and to the same extent that such certification applies to the Seller, effective as of the date of commencement of the license, provided that the Seller notifies the Under Secretary of such license by submitting, within 30 days after such date of commencement, a ''Notice of License of Approved Anti-terrorism Technology'' form issued by the Under Secretary. The Under Secretary shall make this form available at *http://www.dhs.gov* and by mail upon request sent to: Directorate of Science and Technology, SAFETY Act/room 4320, Department of Homeland Security, Washington, DC 20528. Such notification shall not be required for any licensee listed as a Seller on the applicable Certification.

(i) *Transfer of Certification.* In the event of any permitted transfer and assignment of a Designation, any related Certification for the same anti-terrorism technology shall automatically be deemed to be transferred and assigned to the same transferee to which such Designation is transferred and assigned. The transferred Certification will continue to apply to the transferor with respect to all transactions and occurrences that occurred through the time at which such transfer and assignment of the Certification became effective.

(j) *Issuance of Certificate; Approved Product List.* For anti-terrorism technology reviewed and approved by the Under Secretary and for which a Certification is issued, the Under Secretary shall issue a certificate of conformance to the Seller and place the anti-terrorism technology on an Approved Product List for Homeland Security, which shall be published by the Department of Homeland Security.

§ 25.8 Confidentiality and protection of intellectual property.

The Secretary, in consultation with the Office of Management and Budget and appropriate Federal law enforcement and intelligence officials, and in a manner consistent with existing protections for sensitive or classified information, shall establish confidentiality protocols for maintenance and use of information submitted to the Department under the SAFETY Act and this Part. Such protocols shall, among other things, ensure that the Department will utilize all appropriate exemptions from the Freedom of Information Act.

§ 25.9 Definitions.

Act of Terrorism—The term ''act of terrorism'' means any act that—

(1) Is unlawful;

(2) Causes harm to a person, property, or entity, in the United States, or in the case of a domestic United States air carrier or a United States-flag vessel (or a vessel based principally in the United States on which United States income tax is paid and whose insurance coverage is subject to regulation in the United States), in or outside the United States; and

(3) Uses or attempts to use instrumentalities, weapons or other methods designed or intended to cause mass destruction, injury or other loss to citizens or institutions of the United States.

Assistant Secretary—The term ''Assistant Secretary'' means the Assistant Secretary for Plans, Programs, and Budget of the Department of Homeland Security Directorate of Science and Technology, or such other official of such Directorate as may be designated from time to time by the Under Secretary.

Certification—The term ''Certification'' means (unless the context requires otherwise) a certification that a qualified anti-terrorism technology for which a Designation has been issued will perform as intended, conforms to the Seller's specifications, and is safe for use as intended.

Contractor—The term ''contractor'' of a Seller means any person or entity with whom or with which the Seller has entered into a contract relating to the manufacture, sale, use, or operation of anti-terrorism technology for which a Designation is issued (regardless of whether such contract is entered into before or after the issuance of such Designation), including, without limitation, an independent laboratory or other entity engaged in testing

or verifying the safety, utility, performance, or effectiveness of such technology, or the conformity of such technology to the Seller's specifications.

Designation—The term ''Designation'' means a designation of a qualified anti-terrorism technology under the SAFETY Act issued by the Under Secretary under authority delegated by the Secretary of Homeland Security.

Loss—The term ''loss'' means death, bodily injury, or loss of or damage to property, including business interruption loss (which is a component of loss of or damage to property).

Noneconomic damages—The term ''noneconomic damages'' means damages for losses for physical and emotional pain, suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of enjoyment of life, loss of society and companionship, loss of consortium, hedonic damages, injury to reputation, and any other nonpecuniary losses.

Physical harm—The term ''physical harm'' as used in the Act shall mean a physical injury to the body that caused, either temporarily or permanently, partial or total physical disability, incapacity or disfigurement. In no event shall physical harm include mental pain, anguish, or suffering, or fear of injury.

Qualified Anti-Terrorism Technology (QATT)—The term '''qualified anti-terrorism technology''' means any product, equipment, service (including support services), device, or technology (including information technology) designed, developed, modified, or procured for the specific purpose of preventing, detecting, identifying, or deterring acts of terrorism or limiting the harm such acts might otherwise cause, for which a Designation has been issued under this Part.

SAFETY Act or Act—The term ''SAFETY Act'' or ''Act'' means the Support Anti-terrorism by Fostering Effective Technologies Act of 2002, enacted as Subtitle G of Title VIII of the Homeland Security Act of 2002, Public Law 107–296.

Seller—The term ''Seller'' means any person or entity to whom or to which (as appropriate) a Designation has been issued under this Part (unless the context requires otherwise).

Under Secretary—The term ''Under Secretary'' means the Under Secretary for Science and Technology of the Department of Homeland Security.

PART 29—PROTECTED CRITICAL INFRASTRUCTURE INFORMATION

Sec.
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AUTHORITY: Pub. L. 107–296, 116 Stat. 2135 (6 U.S.C. 1 *et seq.*); 5 U.S.C. 301.

SOURCE: 69 FR 8083, Feb. 20, 2004, unless otherwise noted.

§ 29.1 Purpose and scope.

(a) *Purpose of the rule.* This part implements section 214 of Title II, Subtitle B, of the Homeland Security Act of 2002 through the establishment of uniform procedures for the receipt, care, and storage of Critical Infrastructure Information (CII) voluntarily submitted to the Federal government through the Department of Homeland Security. Title II, Subtitle B, of the Homeland Security Act is referred to herein as the Critical Infrastructure Information Act of 2002 (CII Act of 2002). Consistent with the statutory mission of the Department of Homeland Security (DHS) to prevent terrorist attacks within the United States and reduce the vulnerability of the United States to terrorism, it is the policy of DHS to encourage the voluntary submission of CII by safeguarding and protecting that information from unauthorized disclosure and by ensuring that such information is expeditiously and securely shared with appropriate authorities including Federal national security, homeland security, and law enforcement entities and, consistent with the CII Act of 2002, with State and local officials, where doing so may reasonably be expected to

assist in preventing, preempting, and disrupting terrorist threats to our homeland. As required by the CII Act of 2002, the procedures established herein include mechanisms regarding:

(1) The acknowledgement of receipt by DHS of voluntarily submitted CII;

(2) The maintenance of the identification of CII voluntarily submitted to DHS for purposes of, and subject to the provisions of the CII Act of 2002;

(3) The receipt, handling, storage, and proper marking of information as Protected CII;

(4) The safeguarding and maintenance of the confidentiality of such information that permits the sharing of such information within the Federal government and with foreign, State, and local governments and government authorities, and the private sector or the general public, in the form of advisories or warnings; and

(5) The issuance of notices and warnings related to the protection of critical infrastructure and protected systems in such a manner as to protect from unauthorized disclosure the identity of the submitting person or entity as well as information that is proprietary, business sensitive, relates specifically to the submitting person or entity, and is not customarily available in the public domain.

(b) *Scope.* These procedures apply to all Federal agencies that handle, use, or store Protected CII pursuant to the CII Act of 2002. In addition, these procedures apply to United States Government contractors, to foreign, State, and local governments, and to government authorities, pursuant to any necessary express written agreements, treaties, bilateral agreements, or other statutory authority.

§ 29.2 Definitions.

For purposes of this part:

Critical Infrastructure has the definition referenced in section 2 of the Homeland Security Act of 2002 and means systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems and assets would have a debilitating impact on security, national economic security, national public health or safety, or any combination of those matters.

Critical Infrastructure Information, or CII means information not customarily in the public domain and related to the security of critical infrastructure or protected systems. CII consists of records and information concerning:

(1) Actual, potential, or threatened interference with, attack on, compromise of, or incapacitation of critical infrastructure or protected systems by either physical or computer-based attack or other similar conduct (including the misuse of or unauthorized access to all types of communications and data transmission systems) that violates Federal, State, or local law, harms the interstate commerce of the United States, or threatens public health or safety;

(2) The ability of any critical infrastructure or protected system to resist such interference, compromise, or incapacitation, including any planned or past assessment, projection, or estimate of the vulnerability of critical infrastructure or a protected system, including security testing, risk evaluation, risk-management planning, or risk audit; or

(3) Any planned or past operational problem or solution regarding critical infrastructure or protected systems, including repair, recovery, reconstruction, insurance, or continuity, to the extent it is related to such interference, compromise, or incapacitation.

Critical Infrastructure Information Program, or CII Program means the maintenance, management, and review of these procedures and of the information provided to DHS in furtherance of the protections provided by the CII Act of 2002.

Information Sharing and Analysis Organization, or ISAO means any formal or informal entity or collaboration created or employed by public or private sector organizations for purposes of:

(1) Gathering and analyzing CII in order to better understand security problems and interdependencies related to critical infrastructure and protected systems in order to ensure the availability, integrity, and reliability thereof;

(2) Communicating or sharing CII to help prevent, detect, mitigate, or recover from the effects of an interference, compromise, or incapacitation problem related to critical infrastructure or protected systems; and

(3) Voluntarily disseminating CII to its members, Federal, State, and local governments, or to any other entities that may be of assistance in carrying out the purposes specified in this section.

Local Government has the same meaning as is established in section 2 of the Homeland Security Act of 2002 and means:

(1) A county, municipality, city, town, township, local public authority, school district, special district, intrastate district, council of governments (regardless of whether the council of governments is incorporated as a nonprofit corporation under State law), regional or interstate government entity, or agency or instrumentality of a local government;

(2) An Indian tribe or authorized tribal organization, or in Alaska a Native village or Alaska Regional Native Corporation; and

(3) A rural community, unincorporated town or village, or other public entity.

Protected Critical Infrastructure Information, or Protected CII means CII (including the identity of the submitting person or entity) that is voluntarily submitted to DHS for its use regarding the security of critical infrastructure and protected systems, analysis, warning, interdependency study, recovery, reconstitution, or other informational purpose, when accompanied by an express statement as described in § 29.5. This information maintains its protected status unless DHS's Protected CII Program Manager or the Protected CII Program Manager's designees render a final decision that the information is not Protected CII.

Protected System means any service, physical or computer-based system, process, or procedure that directly or indirectly affects the viability of a facility of critical infrastructure and includes any physical or computer-based system, including a computer, computer system, computer or communications network, or any component hardware or element thereof, software program, processing instructions, or information or data in transmission or storage therein, irrespective of the medium of transmission or storage.

Purpose of CII has the meaning set forth in section 214(a)(1) of the CII Act of 2002 and includes the security of critical infrastructure and protected systems, analysis, warning, interdependency study, recovery, reconstitution, or other informational purpose.

Submission to DHS as referenced in these procedures means any transmittal of CII to the DHS Protected CII Program Manager or the Protected CII Program Manager's designees, as set forth in § 29.5.

Voluntary or Voluntarily, when used in reference to any submission of CII to DHS, means submitted in the absence of DHS's exercise of legal authority to compel access to or submission of such information; such submission may be accomplished by (*i.e.*, come from) a single entity or by an ISAO acting on behalf of its members. In the case of any action brought under the securities laws—as is defined in section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(47))—the term ''voluntary'' does not include information or statements contained in any documents or materials filed, pursuant to section 12(i) of the Securities Exchange Act of 1934 (15 U.S.C. 781(i)), with the Securities and Exchange Commission or with Federal banking regulators; and with respect to the submission of CII, it does not include any disclosure or writing that when made accompanies the solicitation of an offer or a sale of securities. The term also explicitly excludes information or statements submitted during a regulatory proceeding or relied upon as a basis for making licensing or permitting determinations.

§ 29.3 Effect of provisions.

(a) *Mandatory submissions of information.* The CII Act of 2002 and these procedures do not apply to or affect any requirement pertaining to information that must be submitted to DHS pursuant to a Federal legal requirement, nor do they pertain to any obligation of any Federal agency to disclose

mandatorily submitted information (even where it is identical to information voluntarily submitted to DHS pursuant to the CII Act of 2002). The fact that a person or entity has voluntarily submitted information pursuant to the CII Act of 2002 does not constitute compliance with any requirement to submit that information to a Federal agency under any other provision of law. Information submitted to any other Federal agency pursuant to a Federal legal requirement is not to be marked as submitted or protected under the CII Act of 2002 or otherwise afforded the protection of the CII Act of 2002, provided, however, that such information, if it is separately submitted to DHS pursuant to these procedures, may upon submission to DHS be marked as Protected CII or otherwise afforded the protections of the CII Act of 2002.

(b) *Freedom of Information Act disclosure exemptions.* Information that is separately exempt from disclosure under the Freedom of Information Act or applicable State or local law does not lose its separate exemption protection due to the applicability of these procedures or any failure to follow them.

(c) *Restriction on use of Protected CII by regulatory and other Federal agencies.* No Federal agency shall request, obtain, maintain, or use information protected under the CII Act of 2002 as a substitute for the exercise of its own legal authority to compel access to or submission of that same information. Federal agencies shall not utilize Protected CII for regulatory purposes without the written consent of the submitter or another party on the submitter's behalf.

(d) *Independently obtained information.* These procedures shall not be construed to limit or in any way affect the ability of a Federal, State, or local government entity, agency, or authority, or any third party, under applicable law, to otherwise obtain CII by means of a different law, regulation, rule, or other authority, including such information as is lawfully and customarily disclosed to the public. Independently obtained information does not include any information derived directly or indirectly from Protected CII subsequent to its submission. Nothing in these procedures shall be construed to limit or in any way affect the ability of such entities, agencies, authorities, or third parties to use such information in any manner permitted by law.

(e) *No private right of action.* Nothing contained in these procedures is intended to confer any substantive or procedural right or privilege on any person or entity. Nothing in these procedures shall be construed to create a private right of action for enforcement of any provision of these procedures or a defense to noncompliance with any independently applicable legal obligation.

§ 29.4 Protected Critical Infrastructure Information Program administration.

(a) *IAIP Directorate Program Management.* The Secretary of the Department of Homeland Security hereby designates the Under Secretary of the Information Analysis and Infrastructure Protection (IAIP) Directorate as the senior DHS official responsible for the direction and administration of the Protected CII Program.

(b) *Appointment of a Protected CII Program Manager.* The Under Secretary for IAIP shall:

(1) Appoint a Protected CII Program Manager within the IAIP Directorate who is responsible to the Under Secretary for the administration of the Protected CII Program;

(2) Commit resources necessary to the effective implementation of the Protected CII Program;

(3) Ensure that sufficient personnel, including such detailees or assignees from other Federal national security, homeland security, or law enforcement entities as the Under Secretary deems appropriate, are assigned to the Protected CII Program to facilitate the expeditious and secure sharing with appropriate authorities, including Federal national security, homeland security, and law enforcement entities and, consistent with the CII Act of 2002, with State and local officials, where doing so may reasonably be expected to assist in preventing, preempting, or disrupting terrorist threats to our homeland; and

(4) Promulgate implementing directives and prepare training materials as appropriate for the proper treatment of Protected CII.

(c) *Appointment of Protected CII Officers*. The Protected CII Program Manager shall establish procedures to ensure that any DHS component or other Federal, State, or local entity that works with Protected CII appoints one or more employees to serve as a Protected CII Officer for the activity in order to carry out the responsibilities stated in paragraph (d) of this section. Persons appointed to these positions shall be fully familiar with these procedures.

(d) *Responsibilities of Protected CII Officers*. Protected CII Officers shall:

(1) Oversee the handling, use, and storage of Protected CII;

(2) Ensure the expeditious and secure sharing of Protected CII with appropriate authorities, as set forth in § 29.1(a) and paragraph (b)(3) of this section;

(3) Establish and maintain an ongoing self-inspection program, to include periodic review and assessment of the entity's handling, use, and storage of Protected CII;

(4) Establish additional procedures as necessary to prevent unauthorized access to Protected CII; and

(5) Ensure prompt and appropriate coordination with the Protected CII Program Manager regarding any request, challenge, or complaint arising out of the implementation of these procedures.

(e) *Protected Critical Infrastructure Information Management System (PCIIMS)*. The Protected CII Program Manager or the Protected CII Program Manager's designees shall develop and use an electronic database, to be known as the ''Protected Critical Infrastructure Information Management System'' (PCIIMS), to record the receipt, acknowledgement, validation, storage, dissemination, and destruction of Protected CII. This compilation of Protected CII shall be safeguarded and protected in accordance with the provisions of the CII Act of 2002.

§ 29.5 Requirements for protection.

(a) CII shall receive the protections of section 214 of the CII Act of 2002 only when:

(1) Such information is voluntarily submitted to the Protected CII Program Manager or the Protected CII Program Manager's designees;

(2) The information is submitted for use by DHS for the security of critical infrastructure and protected systems, analysis, warning, interdependency study, recovery, reconstitution, or other informational purposes including, without limitation, the identification, analysis, prevention, preemption, and/or disruption of terrorist threats to our homeland, as evidenced below;

(3) The information is accompanied by an express statement as follows:

(i) In the case of written information or records, through a written marking on the information or records substantially similar to the following: ''This information is voluntarily submitted to the Federal government in expectation of protection from disclosure as provided by the provisions of the Critical Infrastructure Information Act of 2002''; or

(ii) In the case of oral information, within fifteen calendar days of the oral submission, through a written statement comparable to the one specified above, and a certification as specified below, accompanied by a written or otherwise tangible version of the oral information initially provided; and

(4) The submitted information additionally is accompanied by a statement, signed by the submitting entity, certifying essentially to the following on behalf of the named entity:

(i) The submitter is voluntarily providing the information for the purposes of the CII Act of 2002;

(ii) The information being submitted is not being submitted in lieu of independent compliance with a Federal legal requirement;

(iii) The information is or is not required to be submitted to a Federal agency. If the information is required to be submitted to a Federal agency, the submitter shall identify the Federal agency requiring submission and the legal authority that mandates the submission; and

(iv) The information is of a type not customarily in the public domain.

(b) Information that is not submitted to the Protected CII Program Manager or the Protected CII Program Manager's designees will not qualify for protection under the CII Act of 2002. Any DHS component other than the IAIP Directorate that receives information with a request for protection under the CII Act of 2002, shall immediately forward the information to the Protected CII Program Manager. Only the Protected CII Program Manager or the Protected CII Program Manager's designees are authorized to acknowledge receipt and validate Protected CII pursuant to § 29.6(a).

(c) Federal agencies and DHS components other than the IAIP Directorate shall maintain information as protected by the provisions of the CII Act of 2002 when that information is provided to the agency or component by the Protected CII Program Manager or the Protected CII Program Manager's designees and is marked as required in § 29.6(c).

(d) All submissions seeking Protected CII status shall be regarded as submitted with the presumption of good faith on the part of the submitter.

(e) Submissions must affirm the understanding of the submitter that any false representations on such submissions may constitute a violation of 18 U.S.C. 1001 and are punishable by fine and imprisonment.

§ 29.6 Acknowledgment of receipt, validation, and marking.

(a) *Authorized officials*. Only the Protected CII Program Manager or the Protected CII Program Manager's designees are authorized to acknowledge receipt of and validate information as Protected CII.

(b) *Presumption of protection*. All information submitted in accordance with the procedures set forth herein will be presumed to be and will be treated as Protected CII from the time the information is received by DHS, either through the DHS component or the Protected CII Program Manager or the Protected CII Program Manager's designees. The information shall remain protected unless and until the Protected CII Program Manager or the Protected CII Program Manager's designees render a final decision that the information is not Protected CII.

(c) *Marking of information*. In addition to markings made pursuant to § 29.5(a) by submitters of CII requesting review, all Protected CII shall be clearly identified through markings made by the Protected CII Program Manager or the Protected CII Program Manager's designees. The Protected CII Program Manager or the Protected CII Program Manager's designees shall mark Protected CII materials as follows: ''This document contains Protected CII. In accordance with the provisions of 6 CFR part 29, it is exempt from release under the Freedom of Information Act (5 U.S.C. 552(b)(3)). Unauthorized release may result in civil penalty or other action. It is to be safeguarded and disseminated in accordance with Protected CII Program requirements.''

(d) *Acknowledgement of receipt of information*. The Protected CII Program Manager or the Protected CII Program Manager's designees shall acknowledge receipt of information submitted as CII and accompanied by an express statement and certification, and in so doing shall:

(1) Contact the submitter, within thirty calendar days of receipt, by the means of delivery prescribed in procedures developed by the Protected CII Program Manager or the Protected CII Program Manager. In the case of oral submissions, receipt will be acknowledged in writing within thirty calendar days after receipt by the Protected CII Program Manager or the Protected CII Program Manager's designees of a written statement, certification, and documentation of the oral submission, as referenced in § 29.5(a)(3)(ii);

(2) Maintain a database including date of receipt, name of submitter, description of information, manner of acknowledgment, tracking number, and validation status; and

(3) Provide the submitter with a unique tracking number that will accompany the information from the time it is received by the Protected CII Program Manager or the Protected CII Program Manager's designees.

(e) *Validation of information*. (1) The Protected CII Program Manager or the

Protected CII Program Manager's designees shall be responsible for reviewing all submissions that request protection under the CII Act of 2002. The Protected CII Program Manager or the Protected CII Program Manager's designee shall review the submitted information as soon as practicable. If a determination is made that the submitted information meets the requirements for protection, the Protected CII Program Manager or the Protected CII Program Manager's designee shall mark the information as required in paragraph (c) of this section, and disclose it only pursuant to §29.8.

(2) If the Protected CII Program Manager or the Protected CII Program Manager's designees make an initial determination that the information submitted does not meet the requirements for protection under the CII Act of 2002, the Protected CII Program Manager or the Protected CII Program Manager's designees shall:

(i) Notify the submitter of the initial determination that the information is not considered to be Protected CII. This notification also shall:

(A) Request that the submitter further explain the nature of the information and the submitter's basis for believing the information qualifies for protection under the CII Act of 2002;

(B) Advise the submitter that the Protected CII Program Manager or the Protected CII Program Manager's designees will review any further information provided before rendering a final determination;

(C) Provide the submitter with an opportunity to withdraw the submission;

(D) Notify the submitter that any response to the notification must be received by the Protected CII Program Manager or the Protected CII Program Manager's designees no later than thirty calendar days after the date of the notification; and

(E) Request the submitter to state whether, in the event the Protected CII Program Manager or the Protected CII Program Manager's designees make a final determination that any such information is not Protected CII, the submitter prefers that the information be maintained without the protections of the CII Act of 2002 or be disposed of in accordance with the Federal Records Act.

(ii) If the Protected CII Program Manager or the Protected CII Program Manager's designees, after following the procedures set forth in paragraph (e)(2)(i) of this section, make a final determination that the information is not Protected CII, the Protected CII Program Manager or the Protected CII Program Manager's designees, in accordance with the submitter's written preference, shall maintain the information without protection or following coordination, as appropriate, with other Federal national security, homeland security, or law enforcement authorities, destroy it in accordance with the Federal Records Act unless the Protected CII Program Manager or the Protected CII Program Manager's designees, consistent with the coordination required in this subpart, determine there is a need to retain it for law enforcement and/or national security reasons. The Protected CII Program Manager or the Protected CII Program Manager's designees shall destroy the information within thirty calendar days of making a final determination. If the submitter, however, cannot be notified or the submitter's response is not received within thirty calendar days after the submitter received the notification, as provided in paragraph (e)(2)(i) of this section, the Protected CII Program Manager or the Protected CII Program Manager's designee will destroy the information in accordance with the Federal Records Act, unless the Protected CII Program Manager or the Protected CII Program Manager's designee, after coordination with other Federal national security, homeland security, or law enforcement authorities, as appropriate, determines that there is a need to retain it for law enforcement and/or national security reasons.

(f) *Changing the status of Protected CII to non-Protected CII.* Once information is validated, only the Protected CII Program Manager or the Protected CII Program Manager's designees may change the status of Protected CII to that of non-Protected CII and remove its Protected CII markings. Status

changes may take place when the submitter requests in writing that the information no longer be protected under the CII Act of 2002 or when the Protected CII Program Manager or the Protected CII Program Manager's designee determines that the information was customarily in the public domain, is publicly available through legal means, or is required to be submitted to DHS by Federal law or regulation. The Protected CII Program Manager or the Protected CII Program Manager's designees shall inform the submitter when a change in status is made. Notice of the change in status of Protected CII shall be provided to all recipients of that Protected CII under § 29.8.

§ 29.7 Safeguarding of Protected Critical Infrastructure Information.

(a) *Safeguarding*. All persons granted access to Protected CII are responsible for safeguarding all such information in their possession or control. Protected CII shall be protected at all times by appropriate storage and handling. Each person who works with Protected CII is personally responsible for taking proper precautions to ensure that unauthorized persons do not gain access to it.

(b) *Use and storage*. When Protected CII is in the physical possession of a person, reasonable steps shall be taken to minimize the risk of access to Protected CII by unauthorized persons. When Protected CII is not in the physical possession of a person, it shall be stored in a secure environment that affords it the necessary level of protection commensurate with its vulnerability and sensitivity.

(c) *Reproduction*. Pursuant to procedures prescribed by the Protected CII Program Manager, a document or other material containing PCII may be reproduced to the extent necessary consistent with the need to carry out official duties, provided that the reproduced documents or material are marked and protected in the same manner as the original documents or material.

(d) *Disposal of information*. Documents and material containing Protected CII may be disposed of by any method that prevents unauthorized retrieval.

(e) *Transmission of information*. Protected CII shall be transmitted only by secure means of delivery as determined by the Protected CII Program Manager or the Protected CII Program Manager's designees.

(f) *Automated Information Systems*. The Protected CII Program Manager or the Protected CII Program Manager's designees shall establish security requirements for Automated Information Systems that contain Protected CII.

§ 29.8 Disclosure of Protected Critical Infrastructure Information.

(a) *Authorization of access*. The Under Secretary for IAIP, or the Under Secretary's designee, may choose to provide or authorize access to Protected CII when it is determined that this access supports a lawful and authorized Government purpose as enumerated in the CII Act of 2002, other law, regulation, or legal authority. Any disclosure or use of Protected CII within the Federal government is limited by the terms of the CII Act of 2002. Accordingly, any advisories, alerts, or warnings issued to the public pursuant to paragraph (e) of this section shall protect from disclosure:

(1) The source of any voluntarily submitted CII that forms the basis for the warning, and

(2) Any information that is proprietary, business sensitive, relates specifically to the submitting person or entity, and is not customarily in the public domain.

(b) *Federal, State, and local government sharing*. The Protected CII Program Manager or the Protected CII Program Manager's designees may provide Protected CII to an employee of the Federal government, or of a State or local government, provided that such information is shared for purposes of securing the critical infrastructure and protected systems, analysis, warning, interdependency study, recovery, reconstitution, or for another informational purpose including, without limitation, the identification, analysis, prevention, preemption, and/or disruption of terrorist threats to our homeland. Protected CII may be provided to a State or local government entity only pursuant to its express written

agreement with the Protected CII Program Manager to comply with the requirements of paragraph (d) of this section and that acknowledges the understanding and responsibilities of the recipient.

(c) *Disclosure of information to Federal contractors.* Disclosure of Protected CII to Federal contractors may be made only after the Protected CII Program Manager or a Protected CII Officer certifies that the contractor is performing services in support of the purposes of DHS, the contractor has signed corporate or individual confidentiality agreements as appropriate, covering an identified category of contractor employees where appropriate, and has agreed by contract to comply with all the requirements of the Protected CII Program. The contractor shall safeguard Protected CII in accordance with these procedures and shall not remove any ''Protected CII'' markings. Contractors shall not further disclose Protected CII to any of their components, additional employees, or other contractors (including subcontractors) without the prior written approval of the Protected CII Program Manager or the Protected CII Program Manager's designees, unless such disclosure is expressly authorized in writing by the submitter and is the subject of timely notification to the Protected CII Program Manager.

(d) *Further use or disclosure of information by State and local governments.* (1) State and local governments receiving information marked ''Protected Critical Infrastructure Information'' shall not share that information with any other party, or remove any Protected CII markings, without first obtaining authorization from the Protected CII Program Manager or the Protected CII Program Manager's designees who shall be responsible for requesting and obtaining written consent for any such State or local government disclosure from the person or entity that submitted the information or on whose behalf the information was submitted.

(2) The Protected CII Program Manager or a Protected CII Program Manager's designee may not authorize State and local governments to further disclose the information to another party unless the Protected CII Program Manager or a Protected CII Program Manager's designee first obtains the written consent of the person or entity submitting the information.

(3) State and local governments may use Protected CII only for the purpose of protecting critical infrastructure or protected systems, or in furtherance of an investigation or the prosecution of a criminal act.

(e) *Disclosure of information to appropriate entities or to the general public.* The IAIP Directorate may provide advisories, alerts, and warnings to relevant companies, targeted sectors, other governmental entities, ISAOs or the general public regarding potential threats and vulnerabilities to critical infrastructure as appropriate. In issuing a warning, the IAIP Directorate shall protect from disclosure the source of any Protected CII that forms the basis for the warning as well as any information that is proprietary, business sensitive, relates specifically to the submitting person or entity, and is not customarily in the public domain.

(f) *Access by Congress and whistleblower protection.* (1) Exceptions for disclosure.

(i) Pursuant to section 214(a)(1)(D) of the CII Act of 2002, Protected CII shall not, without the written consent of the person or entity submitting such information, be used or disclosed by any officer or employee of the United States for purposes other than the purposes of the CII Act of 2002, except—

(A) In furtherance of an investigation or the prosecution of a criminal act; or

(B) When disclosure of the information is made—

(*1*) To either House of Congress, or to the extent of matter within its jurisdiction, any committee or subcommittee thereof, any joint committee thereof or subcommittee of any such joint committee; or

(*2*) To the Comptroller General, or any authorized representative of the Comptroller General, in the course of the performance of the duties of the General Accounting Office.

(ii) If any officer or employee of the United States makes any disclosure pursuant to these exceptions, contemporaneous written notification must be provided to the Department through the Protected CII Program Manager.

(2) Consistent with the authority to disclose information for any purpose described in § 29.2, disclosure of Protected CII may be made, without the written consent of the person or entity submitting such information, to the DHS Inspector General, or to any other employee designated by the Secretary of Homeland Security.

(3) Subject to the limitations of title 5 U.S.C., section 1213 (the ''Whistleblower Protection Act''), disclosure of Protected CII may be made by any officer or employee of the United States who reasonably believes that such information:

(i) Evidences an employee's or agency's conduct in violation of criminal law, or any other law, rule, or regulation, affecting or relating to the protection of the critical infrastructure and protected systems, analysis, warning, interdependency study, recovery, or reconstitution or

(ii) Evidences mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety affecting or relating to the protection of the critical infrastructure and protected systems, analysis, warning, interdependency study, recovery, or reconstitution.

(4) Disclosures of all of the information cited in paragraphs (f)(1) through (3) of this section, including under paragraph (f)(1)(i)(A), are authorized by law and therefore are not subject to penalty under section 214(f) of the Homeland Security Act of 2002.

(g) *Responding to requests made under the Freedom of Information Act or State/local information access laws.* (1) Protected CII shall be treated as exempt from disclosure under the Freedom of Information Act and, if provided by the Protected CII Program Manager or the Protected CII Program Manager's designees to a State or local government agency, entity, or authority, or an employee or contractor thereof, shall not be made available pursuant to any State or local law requiring disclosure of records or information. Any Federal, State, or local government agency with questions regarding the protection of Protected CII from public disclosure shall contact the Protected CII Program Manager, who shall in turn consult with the DHS Office of the General Counsel.

(2) These procedures do not limit or otherwise affect the ability of a State or local government entity, agency, or authority to obtain under applicable State or local law information directly from the same person or entity voluntarily submitting information to DHS. Information independently obtained by a State or local government entity, agency, or authority is not subject to the CII Act of 2002's prohibition on making such information available pursuant to any State or local law requiring disclosure of records or information.

(h) *Ex parte communications with decisionmaking officials.* Pursuant to section 214(a)(1)(B) of the Homeland Security Act of 2002, Protected CII is not subject to any agency rules or judicial doctrine regarding ex parte communications with a decision making official.

(i) *Restriction on use of Protected CII in civil actions.* Pursuant to section 214(a)(1)(C) of the Homeland Security Act of 2002, Protected CII shall not, without the written consent of the person or entity submitting such information, be used directly by any Federal, State, or local authority, or by any third party, in any civil action arising under Federal or State law if such information is submitted in good faith under the CII Act of 2002.

(j) *Disclosure to foreign governments.* The Protected CII Program Manager or the Protected CII Program Manager's designees may provide Protected CII to a foreign Government without the written consent of the person or entity submitting such information to the same extent, and under the same conditions, it may provide advisories, alerts, and warnings to other governmental entities as described in paragraph (e) of this section, or in furtherance of an investigation or the prosecution of a criminal act. Before disclosing Protected CII to a foreign government, the Protected CII Program Manager or the Protected CII Program Manager's designees shall protect from disclosure the source of the Protected CII, any information that is proprietary or business sensitive, relates specifically to the

submitting person or entity, or is otherwise not appropriate for such disclosure.

(k) *Obtaining written consent for further disclosure from the person or entity submitting information.* (1) Authority to Seek and Obtain Submitter's Consent to Disclosure. The Protected CII Program Manager or any Protected CII Program Manager's designee may seek and obtain written consent from persons or entities submitting information when such consent is required under the CII Act of 2002 to permit disclosure. In exigent circumstances, and so long as contemporaneous notice is provided to the Protected CII Program Manager or the Protected CII Program Manager's designees, any Federal government employee may seek the consent of the submitting party to the disclosure of Protected CII where such consent is required under the CII Act of 2002.

(2) Consequence of Consent. Whether given in response to a request from the Protected CII Program Manager, the Protected CII Program Manager's designees, or another Federal government employee pursuant to paragraph (k)(1) of this section, a person's or entity's consent to additional disclosure, if conditioned on a limited release of Protected CII that is made for DHS's purposes and in a manner that offers reasonable protection against disclosure to the general public, shall not result in the information's loss of treatment as Protected CII.

§ 29.9 Investigation and reporting of violation of protected CII procedures.

(a) *Reporting of possible violations.* Persons authorized to have access to Protected CII shall report any possible violation of security procedures, the loss or misplacement of Protected CII, and any unauthorized disclosure of Protected CII immediately to the Protected CII Program Manager or the Protected CII Program Manager's designees who shall in turn report the incident to the IAIP Directorate Security Officer and to the DHS Inspector General.

(b) *Review and investigation of written report.* The Inspector General, Protected CII Program Manager, or IAIP Security Officer shall investigate the incident and, in consultation with the DHS Office of the General Counsel, determine whether a violation of procedures, loss of information, and/or unauthorized disclosure has occurred. If the investigation reveals any evidence of wrongdoing, DHS, through its Office of the General Counsel, shall immediately contact the Department of Justice's Criminal Division for consideration of prosecution under the criminal penalty provisions of section 214(f) of the CII Act of 2002.

(c) *Notification to originator of Protected CII.* If the Protected CII Program Manager or the IAIP Security Officer determines that a loss of information or an unauthorized disclosure has occurred, the Protected CII Program Manager or the Protected CII Program Manager's designees shall notify the submitter of the information in writing, unless providing such notification could reasonably be expected to harm the investigation of that loss or any other law enforcement, national security, or homeland security interest. The written notice shall contain a description of the incident and the date of disclosure, if known.

(d) *Criminal and administrative penalties.* As established in section 214(f) of the CII Act, whoever, being an officer or employee of the United States or of any department or agency thereof, knowingly publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information protected from disclosure by the CII Act of 2002 and coming to the officer or employee in the course of his or her employment or official duties or by reason of any examination or investigation made by, or return, report, or record made to or filed with, such department or agency or officer or employee thereof, shall be fined under title 18 of the United States Code, imprisoned not more than one year, or both, and shall be removed from office or employment.

FINDING AIDS

A list of CFR titles, subtitles, chapters, subchapters and parts, and an alphabetical list of agencies publishing in the CFR are included in the CFR Index and Finding Aids volume to the Code of Federal Regulations which is published separately and revised annually.

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